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ARTICLES

THE BATTLE OVER STRICT SCRUTINY: COALITIONAL CONFLICT IN THE REHNQUIST COURT

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Edward V. Heck**

The Constitution of the United States is a document that provides for both rights and powers. The United States Supreme Court has the task of interpreting the "majestic generalities"[1] of the constitutional text and resolving cases that bring into play the inherent conflict between governmental power and individual rights. Over the years, the justices have developed many verbal formulas to aid in the task of interpreting the Constitution. Although commentators often criticize specific tests or condemn the Court for too wide a variety of tests,[2] the justices have continued to rely heavily on verbal formulas. During recent decades the standard of strict scrutiny has become a centerpiece of contemporary First Amendment and equal protection analysis.

This article analyzes the application of strict scrutiny and its "heightened scrutiny" variants during the first four years of the Rehnquist Court. During the later years of the Warren Court and the entire Burger Court, Justice William J. Brennan, Jr. exercised a noteworthy role in urging his colleagues to utilize heightened scrutiny formulas to achieve liberal policy results. Because of Brennan's leading role in fashioning the language of strict scrutiny and structuring discourse about rights within the Court, the first four years of

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1. West Virginia Bd. of Education v. Barnette, 319 U.S. 624, 639 (1943).

2. *See, e.g.* ROBERT F. NAGEL, CONSTITUTIONAL CULTURES (1989); JUDITH A. BAER, EQUALITY UNDER THE CONSTITUTION 26-31, 112-30 (1983).

the Rehnquist Court constitute a vital period in the development and evolution of strict scrutiny discourse. During those years, two appointees of President Ronald Reagan, Justices Antonin Scalia and Anthony Kennedy, joined the Court. Although the justices they replaced were not closely allied with Brennan, the new justices initially appeared exceptionally hostile to many equal protection and first amendment claims.[3] At the end of the period, Brennan retired, leaving the Court stripped of the intellectual progenitor of strict scrutiny. Thus, the period considered in this Article marks the arrival of the "new" conservatism of the Reagan era on the Court and the swan song of Brennan.

This article will set the background for analysis of the Rehnquist Court decisions with an overview of heightened scrutiny as a form of means-ends discourse in constitutional interpretation.[4] The article then examines the use of heightened scrutiny and the application of divergent standards of review in a variety of types of First Amendment cases (freedom of expression and association,[5] free exercise of religion,[6] and establishment of religion[7]), as well as equal protection[8] and substantive due process cases.[9] This article's argument is that the trend during the Rehnquist Court has been toward the use of divergent standards of review in different settings. All members of the Court during this period used the concept of strict scrutiny in their discourse on rights and equality, but their applications of the concept often differed from that favored by Justice Brennan. Because the Court's use of strict scrutiny discourse in this period appears to reflect a court internally divided about standards of review, close attention will be paid to the coalitions of justices who supported differing uses of strict scrutiny during this period.[10] The

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3. Richard A. Brisbin, Jr., *The Conservatism of Antonin Scalia,* 105 POL. SCI. Q. 1 (1990); Sue Davis, *Power on the Court: Chief Justice Rehnquist's Opinion Assignments,* 74 JUDICATURE 66, 71 n.36 (1990); Richard A. Brisbin, Jr., *Justice Antonin Scalia, Constitutional Discourse, and the Legalistic State,* 44 W. POL. Q. 1005 (1991); John J. Carroll & Arthur English, *Justice Anthony Kennedy and the Structure of Government* (Paper presented at the 1990 annual meeting of the American Political Science Association).

4. *See infra* notes 12-24 and accompanying text.

5. *See infra* notes 25-96 and accompanying text.

6. *See infra* notes 97-136 and accompanying text.

7. *See infra* notes 137-95 and accompanying text.

8. *See infra* notes 196-279 and accompanying text.

9. *See infra* notes 280-305 and accompanying text.

10. Analysis of both voting coalitions (the group of justices supporting a particular outcome in a case) and opinion coalitions (the justices supporting an opinion explaining the reasons for the decision) is a significant feature of the scholarly work of political scientists who study the Supreme Court. *See, e.g.,* David W. Rohde, *Policy Goals and Opinion Coalitions in the Supreme Court,* 16 MIDWEST J. POL. SCI. 208 (1972); DAVID W. ROHDE & HAROLD J.

article concludes with a discussion of possible futures for strict scrutiny and other forms of means-ends discourse about conflicts between constitutional rights and governmental power.[11]

I. THE DEVELOPMENT OF STRICT SCRUTINY

The concept of strict scrutiny and its concomitant compelling governmental interest test were central to constitutional discourse about equal protection and First Amendment rights in the Burger Court era (1969-1986). During this era, Justices Brennan and Thurgood Marshall pursued a moral goal when they read the Constitution, a vision of an egalitarian society. To promote their moral vision, through their "systemic" and "transcendent" textual approach,[12] they placed a priority on rights values in the constitutional text. Their attention to rights had an instrumental character. These justices wanted to eliminate systemic bias against disadvantaged groups from the American political process and to build a future society on the transcendent value of human dignity that they found expressed in the text of the Bill of Rights and the fourteenth amendment.[13]

To read systemic and transcendent rights values as central elements in the constitutional text, Brennan and Marshall adopted the ideas of Justice Stone's famous *Carolene Products* footnote, the fountainhead of modern strict scrutiny analysis.[14] Stone's opinion endorsed the principle that the normal rule of deference to the legislature should prevail in cases involving regulation of "ordinary commercial transactions,"[15] but the footnote tentatively suggested the possibility of "more exacting judicial scrutiny" of legislation restricting the political process, as well as the possibility of a "more search-

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SPAETH, SUPREME COURT DECISION MAKING 193-210 (1976); Michael W. Giles, *Equivalent Versus Minimum Winning Opinion Coalition Size*, 21 AM. J. POL. SCI. 405 (1977); Joseph F. Kobylka, *Leadership on the Supreme Court of the United States: Chief Justice Burger and the Establishment Clause*, 42 W. POL. Q. 545 (1989).

11. *See infra* notes 306-13 and accompanying text.

12. WALTER F. MURPHY ET AL., AMERICAN CONSTITUTIONAL INTERPRETATION 292-94 (1986).

13. Justice William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, Presented to the Text and Teaching Symposium, Georgetown University, Washington, D.C. (1985).

14. United States v. Carolene Prods. Co., 304 U.S. 144, 152-53, n.4 (1938). The *Carolene Products* footnote and other Roosevelt Court cases may be aptly characterized as the seeds from which heightened scrutiny doctrine was to grow, but it has been noted that "[i]t was not . . . until the period of the Warren Court (1953-69) that Stone's seeds would come to full flower. "MURPHY ET AL., *supra* note 12, at 491.

15. *Carolene Products*, 304 U.S. at 152.

ing judicial inquiry" in the review of statutes attributable to prejudice against "discrete and insular minorities."[16] That such "searching judicial inquiry" or "exacting scrutiny" should take the form of a relaxation of the presumption of constitutionality seems clearly contemplated in the first paragraph of the footnote, where Stone suggested a "narrower scope for operation of the presumption of constitutionality when legislation appears on its face" to violate the First Amendment or other provisions of the Bill of Rights made applicable to the states by the fourteenth amendment.[17] In short, Stone's *Carolene Products* opinion offers a formula for allocation of the "burden of proof" in constitutional cases. Normally, the individual or corporation challenging a legislative act must carry the burden of convincing the Court that the challenged legislation lacks a rational basis. On the other hand, the burden of convincing the Court to uphold a statute falls on the government in cases involving fundamental rights, closure of the political process, or discrimination against disadvantaged minorities.[18] Reversal of the presumption of constitutionality and imposition of the burden of justification on the government are widely recognized as among the crucial characteristics of strict scrutiny.[19]

As Professor and Constitutional Law Expert Russell Galloway has pointed out, strict scrutiny is but one distinctive form of means-ends discourse, that is, the examination of the purposes (ends) and method (means) of governmental actions alleged to impinge upon constitutional guarantees.[20] As a means-ends test, strict scrutiny is a

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16. *Id.* at 152-53 n.4.

17. *Id.* at 152 n.4.

18. In the original draft of the *Carolene Products* footnote, Stone expressly formulated the new constitutional jurisprudence he was proposing in terms of allocation of the burden of proof. "[O]ne attacking the constitutionality of a statute may be thought to bear a lighter burden," Stone wrote, "when the legislation aims at restricting the corrective political processes which can ordinarily be expected to bring about repeal of undesirable legislation." Reprinted in MURPHY ET AL. *supra* note 12, at 486. When the footnote was revised under the prodding of Chief Justice Hughes, the explicit burden of proof argument was eliminated, but the thought remained in Stone's discussion of the presumption of constitutionality. *Id.* at 487-90.

19. *See, e.g.*, JOEL B. GROSSMAN & RICHARD S. WELLS, CONSTITUTIONAL LAW AND JUDICIAL POLICY MAKING 285 (3d ed. 1988); Randall J. Fox, *Equal Protection Analysis: Laurence Tribe, the Middle Tier and the Role of the Court*, 14 U.S.F. L. REV. 525, 547-48 (1980); Russel W. Galloway, *Means-End Scrutiny in American Constitutional Law*, 21 LOY. L.A.L. REV. 449, 453 (1988) [hereinafter Galloway, *Means-End Scrutiny*]; Russel W. Galloway, Jr., *Basic Equal Protection Analysis*, 29 SANTA CLARA L. REV. 121, 124 (1989) [hereinafter Galloway, *Basic Equal Protection*].

20. In a commentary that recognizes the emergence of more than three levels of scrutiny, Professor Galloway has characterized means-end scrutiny as embracing a spectrum of standards, ranging from the aggressive strict scrutiny of the compelling governmental interest test

mode of analysis that is extremely supportive of the rights' of claimants. Following the broad outlines of the *Carolene Products* footnote, heightened scrutiny discourse presumes that legislation alleged to invade constitutional guarantees is unconstitutional, and places on governmental litigants the burden of persuading the Court of the legitimacy of the challenged law. In the most stringent form of intensified scrutiny, the government must show that the challenged policy serves a crucial or "compelling" governmental interest, is a substantially effective means of furthering the compelling governmental interest, and is a necessary or least restrictive method of achieving the governmental goal.[21] Strict scrutiny thus can be characterized as the approach to constitutional analysis that is most solicitous of those asserting constitutional rights against government. In theory at least, it is a language that empowers the outsiders and minorities who would challenge the policies of the political majority.

Thus, during the 17 years of the Burger Court, Brennan and Marshall often sought to use the compelling interest standard to protect First Amendment rights and rights of voting and participation, as well as to promote the equal treatment of various disadvantaged groups.[22] When dictated by internal divisions within the Court, they were willing to modify strict scrutiny and employ a less stringent form of heightened scrutiny, particularly the test requiring a governmental litigant to show that the challenged law bore a *substantial* relationship to an *important* governmental interest.[23] In addition, Brennan and Marshall took the position that the same intermediate scrutiny standard originally applied in sex discrimination cases was the appropriate test for evaluating governmental efforts to overcome the effects of past discrimination through affirmative action

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through a series of intermediate standards to the most deferential variation of rationality review. Galloway, *Means-Ends Scrutiny*, *supra* note 19, at 451-58. For all levels of means-end scrutiny that require the government to offer more than a "rational basis" justifying its action, Galloway uses the term "intensified scrutiny" (the equivalent of "heightened scrutiny"), which he characterizes as a "more aggressive, less deferential type of judicial review than rationality review." Galloway, *Means-Ends Scrutiny*, *supra* note 19, at 453.

21. Galloway, *Means-Ends Scrutiny*, *supra* note 19, at 453-55.

22. Shapiro v. Thompson, 394 U.S. 618 (1969); Dunn v. Blumstein, 405 U.S. 330 (1972); Frontiero v. Richardson, 411 U.S. 677 (1973) (Opinion of Brennan, J.); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 70 (1973) (Marshall, J., dissenting); Zablocki v. Redhail, 434 U.S. 374 (1978); Harris v. McRae, 448 U.S. 297, 329 (1980) (Brennan J., dissenting); Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 455 (1985) (Marshall, J., dissenting in part); Bernal v. Fainter, 467 U.S. 216, 219-22 (1984).

23. Craig v. Boren, 429 U.S. 190, 197 (1976). *See also* Plyler v. Doe, 457 U.S. 202 (1982).

programs.[24]

No member of the Burger Court was more consistent in opposing the efforts of Brennan and Marshall to use the language of strict scrutiny to benefit disadvantaged groups than Justice Rehnquist. Thus, the promotion of Rehnquist—who had frequently dissented from opinions applying heightened scrutiny standards—to Chief Justice, along with the appointments of Scalia and Kennedy as Associate Justices, created the potential for an approach to strict scrutiny significantly different from that which prevailed in the Burger Court. This article, therefore, will consider the use of strict scrutiny and related forms of means-end scrutiny during the first four years of the Rehnquist Court in cases involving First Amendment, equal protection, and substantive due process issues.

II. Freedom of Expression in the Rehnquist Court

During the first four years of the Rehnquist Court, the justices decided a wide range of cases dealing with the First Amendment freedoms of speech, press, assembly and association. Laws regulating political campaigns, restricting commercial speech, and outlawing flag burning and obscenity hardly begin to encompass the diversity of governmental actions challenged on First Amendment grounds during the 1986-87 through 1989-90 terms. Outcomes varied, as did coalitions formed in support of or in opposition to First Amendment claims pressed by litigants. Many cases were resolved without explicit discussion of strict scrutiny or the proper standard of review to be applied. Yet found within this diversity is a striking pattern likely to surprise those inclined to view the Rehnquist Court as overtly hostile to judicial enforcement of constitutional rights. During the first four years of the Rehnquist Court there was, in fact, widespread support for the proposition that laws and government actions restricting "core" political expression or association should be reviewed under the compelling governmental interest standard. In no less than eight cases the Court invoked the most stringent form of strict scrutiny to strike down laws restricting overtly political expression or association.[25] Although the voting patterns in these cases re-

24. University of Calif. Regents v. Bakke, 438 U.S. 265 (1978); (Opinion of Brennan, White, Marshall, and Blackmun, JJ.); Fullilove v. Klutznick, 448 U.S. 448, 517 (1980) (Marshall, J., concurring).

25. FEC v. Massachusetts Citizens for Life, 479 U.S. 238 (1986); Boos v. Barry, 485 U.S. 312 (1988); Meyer v. Grant, 486 U.S. 414 (1988); Eu v. San Francisco Democratic Central Committee, 489 U.S. 214 (1989); Texas v. Johnson, 491 U.S. 397 (1989); Butterworth v. Smith, 494 U.S. 624 (1990); United States v. Eichman, 110 S. Ct. 2404 (1990);

flect shifting coalitions, enough different justices supported these opinions to conclude that strict scrutiny was widely accepted as an appropriate tool for striking the balance between individual liberty and governmental power where political speech was involved. Nor do the eight cases in which strict scrutiny was used to protect political expression/association constitute the whole of Rehnquist Court discourse on standards of review in freedom of expression cases. In another case, a majority of the justices applied strict scrutiny and ruled that the government had met the heavy burden of justification imposed by the compelling interest standard.[26] Moreover, in many other cases the justices applied varying forms of intermediate scrutiny, as well as engaging in spirited debates about the proper standard of review.[27] Despite disagreements among the justices, heightened scrutiny was a significant—if not dominant—feature of the First Amendment jurisprudence of the early Rehnquist Court.

The proposition that the most stringent form of strict scrutiny is appropriate when government imposes restrictions on political expression or association gained majority support and was used to strike down a federal law in *FEC v. Massachusetts Citizens for Life.*[28] Writing for a five-member majority that included Marshall and Powell as well as Reagan appointees Scalia and O'Connor,[29] Justice Brennan declared that "when a statutory provision burdens first amendment rights, it must be justified by a compelling state interest."[30] Applying this standard, Brennan concluded that the Federal Election Commission had not offered a sufficiently compelling justification for a federal campaign spending law prohibiting the use of corporate treasury funds in electoral campaigns, when applied to a corporation "formed to disseminate political ideas, not to amass capital."[31] Joined in dissent by White, Blackmun, and Stevens, the

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Rutan v. Republican Party of Illinois, 110 S. Ct. 2729 (1990). A ninth case arguably falling into this grouping is Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986). Although the Court struck down a state law barring Independents from voting in the Republican primary on freedom of association grounds in an opinion by Justice Marshall, there was no explicit invocation of strict scrutiny in the majority opinion.

26. Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990). *See infra* notes 70-72 and accompanying text.

27. *See infra* notes 57-69, 75-96 and accompanying text.

28. 479 U.S. 238 (1986).

29. Justice O'Connor agreed with Brennan on the standard of review and the outcome, but did not join a section of Brennan's opinion discussing the impact of campaign spending laws on MCFL.

30. 479 U.S. at 252.

31. *Id.* at 259. In Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990), the majority limited *FEC* by upholding application to the Chamber of Commerce of a state law

Chief Justice argued that federal campaign financing regulations should receive deferential treatment from the Court.

The debate over standards of review begun in *FEC v. MCFL* continued in other cases in which five-member majorities used strict scrutiny to overturn laws restricting political expression. In *Boos v. Barry*,[32] the Court struck down provisions of the District of Columbia code that had the effect of prohibiting demonstrations critical of a foreign government near that nation's embassy. Following basic principles long articulated by Justice Brennan, Justice O'Connor wrote for the majority that a "*content-based* restriction on *political speech* in a *public forum* . . . must be subjected to the most exacting scrutiny."[33] Furthermore, she spelled out in rather precise language the burden the government must surmount in order to regulate such speech: "[W]e have required the State to show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end'."[34] Even if international law provided a compelling justification for protecting the "dignity" of foreign diplomats, a broadly-worded antipicketing ordinance could not be considered a "narrowly tailored" means of achieving the desired end. Joining the sections of O'Connor's opinion specifying the standard of review were Brennan, Marshall, Stevens, and Scalia.

The far-reaching implications of O'Connor's opinion in *Boos* became clear when Justice Brennan used it to strike down state and federal laws prohibiting flag burning as a form of political protest.[35] Rejecting the "relatively lenient standard"[36] of *United States v. O'Brien*,[37] because the government interest in prosecuting flag burn-

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prohibiting campaign contributions from corporate treasuries. All justices in *Austin* agreed that the compelling interest standard should be applied in such a case, but three Reagan appointees disagreed with the majority's conclusion that the state had met its heavy burden of proof.

32. 485 U.S. 312 (1988).

33. *Id.* at 321 (emphasis in original).

34. *Id.* (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

35. Texas v. Johnson, 491 U.S. 397 (1989); United States v. Eichman, 110 S. Ct. 2404 (1990).

36. *Johnson*, 491 U.S. at 407.

37. 391 U.S. 367 (1968). The Court applied the four-part "*O'Brien* test" to uphold a conviction for burning a draft card. Chief Justice Warren formulated the test for determining the constitutionality of a law that has the incidental effect of restricting "symbolic speech" as follows: "[W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an *important* or *substantial governmental interest*; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 377 (emphasis added). Although used in

ers was *not* "unrelated to the suppression of free expression,"[38] Brennan cited O'Connor's *Boos v. Barry* opinion as the basis for subjecting "the State's asserted interest in preserving the special symbolic character of the flag to the 'most exacting scrutiny'."[39] A year later, Brennan used virtually identical reasoning to strike down the federal Flag Protection Act.[40] Although O'Connor voted with the dissenters to uphold these laws, Brennan gained a majority by picking up the support of Justice Kennedy, as well as Marshall, Blackmun, and Scalia.

In *Rutan v. Republican Party of Illinois*[41] Brennan again wrote for a 5-4 majority, applying strict scrutiny in a First Amendment case. Joining him in striking down patronage-based employment practices in Illinois were Justices White, Marshall, Blackmun, and Stevens. Drawing on earlier opinions striking down patronage dismissals,[42] Brennan concluded that the patronage practices at issue in this case burdened rights of political association and violated the First Amendment unless they were "narrowly tailored to further vital government interests."[43] Abandoning his alliance with Brennan, Justice Scalia explicitly rejected the strict scrutiny standard in favor of a rational basis standard in cases involving government employment.

Only Justices Brennan and Marshall were with the majority in all five of these cases in which a closely-divided Court provided First Amendment protection for political speech or association. In each case they needed to win the support of three other justices to build majority coalitions supporting the application of strict scrutiny. Each of the associate justices joined the liberal duo in at least one of these cases. Despite his desertion in *Rutan*, Justice Scalia was their most reliable ally, joining the opinion supported by Brennan and Marshall in four of the five cases. Indicative of the breadth of support for applying strict scrutiny where political expression is involved is the fact that only Chief Justice Rehnquist consistently dissented in these cases. While no ringing theme runs through the dissenting opinions of the Chief Justice and the shifting groups of moderate and con-

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this case to reject a first amendment claim, the *O'Brien* test seems to reflect a form of intensified means-end scrutiny and can be considered a "relatively lenient" standard only in contrast to the most stringent form of strict scrutiny.

38. *Johnson*, 491 U.S. 407.

39. *Id.* at 412, (quoting Boos v. Barry, 485 U.S. at 321).

40. United States v. Eichman, 110 S. Ct. 2404, 2409 (1990).

41. 110 S. Ct. 2729 (1990).

42. Elrod v. Burns, 427 U.S. 347 (1976); Branti v. Finkel, 445 U.S. 507 (1980).

43. *Rutan*, 110 S. Ct. at 2376.

servative justices who supported him, the dissenters generally favored more deferential treatment of challenged governmental actions than the shifting majority coalitions centered on Brennan and Marshall.

Even more impressive evidence of the Rehnquist Court's support for strict scrutiny where government regulates core political speech are three unanimous decisions applying strict scrutiny to strike down state laws imposing direct restrictions on such speech. With the Chief Justice not participating, the Court declared unconstitutional a California law prohibiting primary endorsements by political party governing bodies.[44] In the Court's opinion, Justice Marshall articulated the principle that a law burdening the speech and association rights of political parties and party members "can survive constitutional scrutiny only if the State shows that it advances a compelling state interest . . . and is narrowly tailored to serve that interest."[45] While conceding that stable government was a compelling state interest, Marshall concluded that it was not clear how an endorsement ban promoted that interest.[46] Although Justice Stevens could not resist adding a concurring opinion echoing Blackmun's earlier reservations about the value of "compelling state interest" and other "easy phrases" for constitutional analysis, he nonetheless joined Marshall's opinion to make it the unanimous opinion of the eight justices participating.[47]

Stevens authored an opinion in which a unanimous Court struck down a Colorado law prohibiting the use of paid petition circulators in a campaign to gather signatures to qualify an initiative measure for the ballot.[48] Although he avoided "compelling governmental interest" phraseology, Stevens noted that "exacting scrutiny" was required and the State bore the burden of justifying the restrictive law because it burdened "core political speech."[49] According to Stevens, "the statute trenches upon an area in which the importance of First Amendment protection is 'at its zenith.' For that reason," he concluded, "the burden that Colorado must overcome to justify this criminal law is well-nigh insurmountable."[50] Even Chief Justice Rehnquist was willing to endorse this application of strict scrutiny

44. Eu v. San Francisco Democratic Cent. Comm., 489 U.S. 214 (1989).

45. *Id.* at 222.

46. *Id.* at 226.

47. *Id.* at 234 (Stevens, J., concurring), quoting Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 188-89 (1979).

48. Meyer v. Grant, 486 U.S. 414 (1988).

49. *Id.* at 420-22.

50. *Id.* at 425.

where political speech was involved.

In *Butterworth v. Smith*[51] the Chief Justice himself wrote an opinion striking down a Florida law prohibiting a grand jury witness from ever revealing his/her testimony. He began with the recognition that speech bearing on alleged government misconduct was speech at the core of First Amendment guarantees. Rehnquist avoided the "compelling interest" terminology, but concluded that a prohibition on publication of lawfully-obtained truthful information cannot be constitutionally enforced "absent a need to further a state interest of the highest order."[52]

These eight cases, then, indicate remarkable unity on the proposition that the First Amendment's central meaning is the protection of political speech[53] and that it is appropriate for the justices to apply strict scrutiny in cases in which government restricts such speech. The Rehnquist Court also found violations of First Amendment rights in a significant number of cases less directly implicating political expression, with Court majorities often invoking the compelling governmental interest standard or other forms of heightened scrutiny. In *Arkansas Writers' Project v. Ragland*, the majority applied strict scrutiny to a claim of press freedom, invoking the compelling interest standard to strike down a law imposing a discriminatory tax on some kinds of magazines.[54] In *Riley v. National Federation for the Blind*[55] Justice Brennan used strict scrutiny to strike down laws requiring charitable solicitors to reveal the percentage of funds raised that were actually applied to charity. Strict scrutiny analysis even found its way into majority opinions in the obscenity/pornography field. In *Sable Communications v. FCC*[56] the Court split on the constitutionality of federal regulations outlawing obscene dial-a-porn calls, but the justices unanimously agreed that a ban on indecent calls was not consistent with the compelling interest standard.

On the issue of commercial speech, the justices agreed that the intermediate scrutiny approach based on *Central Hudson Gas & Electric Co v. Public Service Commission of New York*[57] provided

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51. 494 U.S. 624 (1990).

52. *Id.* at 632, quoting Smith v. Daily Mail Publishing Co., 443 U.S. 97, 103 (1979).

53. Harry Kalven, Jr., *The New York Times Case: A Note on "the Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191.

54. Arkansas Writers' Project v. Ragland, 481 U.S. 221 (1987).

55. 487 U.S. 781 (1988).

56. 492 U.S. 115 (1989).

57. 447 U.S. 557, 566 (1980). Justice Powell formulated the test to be applied in commercial speech cases as follows: "At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at

the appropriate standard of review.[58] There was, however, considerable coalitional conflict over whether this general standard should be applied to lawyer advertising. In *Shapero v. Kentucky Bar Ass'n*,[59] the Court ruled that the state could not categorically prohibit lawyers from soliciting business by sending personalized letters to potential clients. Speaking for a majority of six, Justice Brennan applied an intermediate scrutiny standard previously applied in lawyer advertising cases: "Commercial speech that is not false or deceptive and does not concern unlawful activities . . . may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest."[60] In a dissent joined by Rehnquist and Scalia, O'Connor rejected previous lawyer advertising cases and called for "greater deference to the States' legitimate efforts to regulate advertising by their attorneys."[61] Although she accepted the *Central Hudson* test and its standard of intermediate scrutiny, O'Connor argued that many restrictions on lawyer advertising were appropriate means of pursuing the substantial governmental interest of "preventing the potentially misleading effects of targeted, direct-mail advertising as well as the corrosive effects that such advertising can have on appropriate professional standards."[62] Similar coalitional conflict—though without explicit debate about the application of intermediate scrutiny—was apparent a year later when the Court reversed an Illinois Supreme Court decision censuring a lawyer for holding himself out as a specialist in trial advocacy in violation of bar association rules.[63]

In other cases the Court resolved conflicting claims of individual and government on the side of litigants asserting First Amendment rights without invoking the language of heightened scrutiny directly. Conflicts involving freedom of the press, in particular, were resolved in favor of the press without explicit discussion of standards of review.[64] In two majority opinions, Justice Marshall employed a bal-

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least must concern lawful activity and not be misleading. Next we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest."

58. Bd. of Trustees of SUNY v. Fox, 492 U.S. 469, 476 (1989).

59. 486 U.S. 466 (1988).

60. *Id.* at 472, quoting Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 638 (1985).

61. *Id.* at 481 (O'Connor, J., dissenting).

62. *Id.* at 1928 (O'Connor, J., dissenting).

63. Peel v. Attorney Registration & Disciplinary Comm'n, 110 S. Ct. 2281 (1990).

64. *E.g.*, City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988); Florida Star v. BJF, 491 U.S. 524 (1989). The Court's unanimous decision to apply the "actual

ancing approach that did not specify the applicable standard of review to reject state efforts to restrict the associational rights of political parties[65] and rhetorical speech on issues of public concern by government employees.[66] Other First Amendment opinions written[67] or supported by the Court's liberals[68] relied on overbreadth analysis as a means of striking down unusually sweeping restrictions on expressive activity. Yet, it is important to note that even these opinions provide evidence that heightened scrutiny discourse was pervasive in the Rehnquist Court's freedom of expression cases. In *Jews for Jesus*, Justice O'Connor prefaced her opinion striking down on overbreadth grounds a regulation barring "all First Amendment activities" in the Los Angeles International Airport central terminal with a doctrinal overview explicitly relating forum analysis and standards of review. This overview set out standards that ranged from a compelling interest test applicable to government efforts to enforce content-based exclusions in a public forum, through an intermediate standard applicable to content-neutral time, place, and manner regulations of expression in a public forum, to a deferential reasonableness standard to test government efforts to restrict access to a nonpublic forum.[69] Significantly, all nine justices joined this opinion, suggesting once again a broad consensus on the position that heightened scrutiny is an appropriate tool for enforcement of First Amendment guarantees, particularly where political speech is involved.

Thus, despite some coalitional conflict both over levels of scrutiny and over the application of agreed-upon standards, the cases in which the Rehnquist Court ruled in favor of First Amendment claims reveal widespread support for application of some form of heightened scrutiny in a variety of factual settings. Somewhat ironically, the clearest indication of the Court's consensus on the strict scrutiny framework is *Austin v. Michigan Chamber of Commerce* in which the majority rejected a First Amendment claim.[70] At issue was a Michigan law prohibiting independent expenditures drawn from

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malice" standard of New York Times v. Sullivan, 376 U.S. 254 (1964) to an emotional distress suit brought by a public figure also illustrates how the Court supported First Amendment claims without explicitly employing heightened scrutiny. Hustler Magazine v. Falwell, 485 U.S. 46 (1988).

65. Tashjian v. Republican Party of Conn., 479 U.S. 208 (1986).

66. Rankin v. McPherson, 483 U.S. 378 (1987).

67. Houston v. Hill, 482 U.S. 451 (1987) (striking down on overbreadth grounds a city ordinance outlawing speech interrupting a police officer in performance of an official duty).

68. Airport Comm'rs v. Jews for Jesus, 482 U.S. 569 (1987).

69. *Id.* at 572-73.

70. Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990).

corporate treasuries in elections for state office. All nine justices agreed that the compelling interest standard should be applied when state laws imposed such a direct burden on political expression. Writing for a majority that included both Brennan and Rehnquist, Justice Marshall concluded that the state had met its burden of showing that the challenged law was necessary to promote its compelling interest in preventing distortions of the political process attributable to the ability of corporations to amass funds unrelated to public support for the organization's position.[71] In separate dissenting opinions, both Scalia and Kennedy (joined by O'Connor) attacked the majority for endorsing censorship and argued that the state had *not* shown a compelling justification for a direct restriction on political expression.[72] Whatever the outcome may say about the justice's attitudes toward corporations in opposing coalitions, the spectacle of three Reagan appointees attacking Brennan and Marshall for lack of vigor in enforcing First Amendment rights surely supports the conclusion that there is little debate within the Rehnquist Court about the general principle of applying strict scrutiny where political speech is concerned.

Although the pattern of conservative justices dissenting from a majority decision to uphold a law challenged on First Amendment grounds was unique to the *Austin* case, coalitional conflict along liberal/conservative lines appears to have been more pervasive in cases in which the Rehnquist Court rejected freedom of speech, press, or association claims than when the Court ruled in favor of litigants asserting First Amendment rights. In *Board of Directors Rotary International v. Rotary Club of Duarte*[73] the Court unanimously rejected a First Amendment freedom of association challenge to a California law requiring Rotary Club chapters to admit women as members. All participating justices except Scalia joined Blackmun's opinion which declared that any infringement of Rotary members' rights of expressive association was "justified because it serves the State's compelling interest in eliminating discrimination against women."[74] Otherwise, coalitional conflict was the norm when opinions discussed levels of scrutiny and the Court rejected First Amendment claims. While the standard of review invoked by shifting majorities varied from case to case, Justices Brennan and Marshall—often joined by Blackmun and/or Stevens—were consis-

71. *Id.* at 659-60.
72. *Id.* at 679 (Scalia, J., dissenting), 695 (Kennedy, J., dissenting).
73. 481 U.S. 537 (1987).
74. *Id.* at 549.

tent in endorsing relatively stringent standards. In at least five cases, the justices in opposing coalitions debated levels of scrutiny and disagreed on the proper standard to be applied.[75] In *United States v. Kokinda*[76] Justice O'Connor applied a "reasonableness" standard to uphold a Postal Service regulation prohibiting charitable solicitations on a post office sidewalk. Three Reagan appointees and Justice White agreed that the deferential standard was appropriate because the sidewalk in question was not a public forum.[77] Both Justice Kennedy in a concurring opinion and Justice Brennan in dissent argued for a more demanding standard of review. Brennan criticized the plurality's use of public forum analysis to uphold restrictions on speech and favored application of the compelling interest standard when government imposed content-based restrictions on expression in a public forum.[78] In *Munro v. Socialist Workers Party*[79] the majority upheld a state law that generally had the effect of excluding minor party candidates from the general election ballot. In the majority opinion Justice White appeared to apply a deferential reasonableness standard.[80] Criticizing the majority for failing to clearly articulate the standard applied, Marshall and Brennan asserted that prior cases unequivocally established a strict scrutiny test when a statute burdened minor party access to the ballot.[81]

Coalitional conflict was particularly acute in three cases in which a conservative majority argued that the special character of schools or prisons mandated a deferential standard of review. In *Hazlewood School District v. Kuhlmeir,* Justice White ruled that school officials were entitled to regulate the content of school newspapers in a manner "reasonably related to legitimate pedagogical concerns."[82] Observing that school officials in this case had broken their promise not to restrict free expression, Brennan (joined by Marshall and Blackmun) argued for a less deferential standard based on *Tinker v. Des Moines School District.*[83] In *Turner v. Safley*[84] a 5-4 majority

75. Munro v. Socialist Workers Party, 479 U.S. 189 (1986); United States v. Kokinda, 110 S. Ct. 3115 (1990); Hazlewood Sch. Dist. v. Kuhlmeir, 484 U.S. 260 (1988); Thornburgh v. Abbott, 490 U.S. 401 (1989); Turner v. Safley, 482 U.S. 78 (1987). *See infra* notes 76-87 and accompanying text.

76. 110 S. Ct. 3115 (1990).

77. *Id.* at 3120-22.

78. *Id.* at 3127, 3133 (Brennan, J., dissenting).

79. 479 U.S. 189 (1986).

80. *Id.* at 195-96.

81. *Id.* at 200-01 (Marshall, J., dissenting).

82. Hazlewood Sch. Dist. v. Kuhlmeir, 484 U.S. at 273.

83. 393 U.S. 503 (1969).

84. 482 U.S. 78 (1987).

rejected strict scrutiny in the prison context and upheld Missouri regulations restricting correspondence between inmates held in different prisons. Deferring to the expertise of prison officials, Justice O'Connor found the challenged regulations "reasonably related to legitimate security interests."[85] Justice Stevens' dissent—joined by Brennan, Marshall, and Blackmun—showed little concern for standards of review in the abstract, but clearly imposed on prison officials seeking to restrict prisoners' "right to communicate" a burden of justification akin to heightened scrutiny.[86] Similar conflict marked the Court's decision in *Thornburgh v. Abbott* upholding federal prison regulations allowing wardens to deny prisoners access to magazine issues deemed threatening to prison security or discipline.[87] Justice Blackmun wrote for a six member majority applying the deferential standard of *Turner v. Safley*, while Stevens argued for an intermediate level of scrutiny.

In other cases, coalitional conflict centered not on the standard of review, but on its application. In both *Frisby v. Schultz*[88] and *Ward v. Rock Against Racism*,[89] the majority applied a form of heightened scrutiny, but ruled that local ordinances alleged to violate the First Amendment were constitutional. In *Frisby* Justice O'Connor concluded that a content-neutral ordinance prohibiting picketing in front of a residence was "narrowly tailored to serve a significant governmental interest" in protecting the privacy of the home[90] and left open "ample alternative channels of communication."[91] Although agreeing that the majority had articulated the appropriate test, Brennan, Marshall, and Stevens concluded that the challenged ordinances did not meet the "narrowly tailored" requirement.[92]

In the commercial speech area, the Court's internal debate was characterized by general agreement on the intermediate scrutiny standard derived from *Central Hudson*, accompanied by disagreement about its application. In *Board of Trustees of SUNY v. Fox*[93]

85. *Id.* at 91 (1987). Using the same "reasonable relationship" standard, the Court did, however, strike down on substantive due process grounds regulations imposing stringent restrictions on the right of prisoners to marry. *Id.* at 95-99.

86. *Id.* at 100 (Stevens, J., concurring in part and dissenting in part).

87. Thornburgh v. Abbott, 409 U.S. 401 (1989).

88. 487 U.S. 474 (1988).

89. 409 U.S. 401 (1989).

90. Frisby v. Schultz, 487 U.S. at 484-88.

91. *Id.* at 489.

92. *Id.* at 491 (Brennan, J., dissenting), 496 (Stevens, J., dissenting).

93. 492 U.S. 469 (1989).

all nine justices joined opinions approving the *Central Hudson* test.[94] There was no dispute about the proposition that a restriction on truthful commercial speech should be upheld only if it *directly advances* a *substantial governmental interest.* Writing for a six-member majority, Justice Scalia concluded that the final *Central Hudson* requirement that a regulation must not be "more extensive than is necessary to serve that interest" should not be interpreted as mandating a "least restrictive means" test. Instead, Scalia concluded, a standard of "narrowly tailored to serve a significant government interest" would be appropriate in light of the "subordinate position [of commercial speech] in the scale of First Amendment values."[95] In dissent, Justice Blackmun, joined by Brennan and Marshall, criticized the majority for "recasting" the language of earlier commercial speech decisions, but avoided the "least restrictive means" issue by arguing that the case should have been decided on overbreadth grounds.[96]

There was, then, considerable conflict among the justices over outcomes in freedom of speech, press, assembly, and association cases during the first four years of the Rehnquist Court. Although coalitions were fluid, the justices more often than not split broadly along liberal-conservative lines, particularly when a majority *rejected* First Amendment claims. This conflictual pattern should not obscure fundamental points of agreement, however. A consensus emerged that the compelling governmental interest standard was the norm when direct restrictions on core political speech were challenged. Moreover, the debates among the justices were almost invariably framed in terms of means-end scrutiny, and at least some of the justices (often a majority) invariably called for applying a standard less deferential to governmental claims than rationality review when First Amendment freedoms of expression or association were at issue.

II. Free Exercise Claims

In the later years of the Warren Court and throughout the Burger Court, the use of strict scrutiny concepts and the compelling governmental interest standard were staple features of the Court's free exercise jurisprudence.[97] During the Rehnquist Court, some cases

94. *See supra* note 57.

95. Bd. of Trustees of SUNY v. Fox, 492 U.S. at 477.

96. *Id.* at 3038 (Blackmun, J., dissenting).

97. Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1971); Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 398 (1981); United States v. Lee, 455 U.S. 252 (1982). *See* Galloway, *Basic Free Exercise Analysis*, 29 Santa Clara L.

confirmed the use of strict scrutiny when state laws allegedly violated the First Amendment's guarantee of the free exercise of religion. Applying Warren and Burger Court precedents, Brennan specifically used the compelling interest test to strike down a state unemployment compensation agency's decision to deny benefits to an individual who was fired because she converted to a Sabbatarian religion which prohibited Saturday work.[98] Only Rehnquist dissented. In another case, an individual who was not a member of a Sabbatarian religion refused to work Sundays. Implicitly using heightened scrutiny, Justice White held that the state had the burden of proof to justify any interference with religious belief. Since it had not done so, the state could not deny him the benefits.[99]

Aside from the Sabbatarian cases, the Rehnquist Court exhibited considerable conflict about the use of heightened scrutiny language in free exercise cases. In contrast to the broad consensus and fluid coalitions characterizing freedom of expression and association cases, the splits in free exercise cases were substantially bipolar. Justices Rehnquist, White, Scalia, and Kennedy usually formed a coalition to deny free exercise claims, using a deferential rationality standard. A coalition of Brennan, Marshall, and Blackmun formed an opposing group. O'Connor and Stevens stood between the two coalitions, but often voted to deny these claims.

The use of the less demanding reasonableness standard marked the free exercise decisions of the Rehnquist-White-Scalia-Kennedy coalition. In *O'Lone v. Estate of Shabazz*[100] the Court explored whether maximum security inmates in a New Jersey prison had the right to demand attendance at Jumu'ah, an Islamic congregational service, under the free exercise clause. Prison officials had banned their attendance because it violated rules on prison security that restricted maximum security inmates from less secure areas of the prison and from contact with certain other prisoners. Rehnquist, adhering to his previous use of a deferential standard when evaluating the rights of prisoners, denied the free exercise claim. His argument was straight forward. Previous cases had established that incarceration partially limited prisoners' privileges and rights. The Court had deferred to prison officials who acted in a reasonable manner to secure and safely administer prisons in past cases.[101] In this case the

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REV. 865, 873-76 (1989).

98. Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 140-42 (1981).

99. Frazee v. Illinois Dep't. of Employment Sec., 489 U.S. 829 (1987).

100. 482 U.S. 342 (1987).

101. Turner v. Safley, 482 U.S. 78 (1987); Bell v. Wolfish, 441 U.S. 520 (1979).

prison administrators had a series of reasonable concerns about prison security and management if maximum security prisoners attended Jumu'ah. Finally, the maximum security prisoners had alternative means of religious expression. Therefore, the Chief Justice concluded that the restriction on religious expression was reasonable.[102] Brennan's dissent, joined by Marshall, Blackmun and Stevens, began by attacking the use of the reasonableness standard in Rehnquist Court free exercise cases. Brennan argued that the Court should have adopted an approach to prisoners' rights like that developed by Court of Appeals Judge Irving Kaufman.[103] The approach suggested by Kaufman would permit the use of a reasonableness standard when a prisoner seeks to engage in a presumptively dangerous activity or when a prison regulation controls only the time, place, or manner of expression. However, in cases like *Estate of Shabazz* where the activity is not presumptively dangerous and where the prisoner has been completely denied the exercise of the right, the government must show that the policy is necessary to achieve an important governmental objective.[104] Brennan could not locate in the "assertions" of possible security problems offered by the prison administration a state interest of sufficient importance to justify the denial of religious exercise in this case.

O'Connor's opinion for the Court in *Lyng v. Northwest Indian Cemetery Ass'n*[105] employed strict scrutiny language, but in a way that varied from the free exercise cases about employment practices. At issue was a Forest Service plan to build roads and permit timber harvesting in areas of a national forest traditionally used for religious services by Native Americans. Relying on *Bowen v. Roy*,[106] where the Burger Court held it constitutional to require a person to use a Social Security number in transactions with the government despite free exercise objections, O'Connor sustained the Forest Service plan. She held that the road building and timber harvesting did not coerce the Native Americans into violating their religious beliefs nor "penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens."[107] Further, she contended that this holding fit with the con-

102. *Estate of Shabazz*, 482 U.S. at 350-52.

103. Abdul Wali v. Coughlin, 745 F.2d 1015 (2d Cir. 1985).

104. *Estate of Shabazz*, 482 U.S. at 358 (Brennan, J., dissenting).

105. 485 U.S. 439 (1988).

106. 476 U.S. 693 (1986).

107. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. at 449.

cept of strict scrutiny used in prior free exercise cases.[108]

Thus, O'Connor confined strict scrutiny to situations when the government engaged in coercion, as she contends occurred in the unemployment compensation-free exercise cases like *Hobbie* and *Frazee*. Yet, her effort to distinguish the cases failed to clarify why the state practices in the unemployment compensation cases were coercive and not merely inhibitory or frustrating. In *Northwest Indian Cemetery*, however, she simply concluded that the frustration or inhibition of religious practice was minimal and served reasonable governmental objectives.[109] Brennan's dissenting opinion in this case, joined by Marshall and Blackmun, rejected O'Connor's restriction of violations of the Free Exercise clause to situations involving direct coercion. He contended that, "the constitutional guarantee we interpret today . . . draws no such fine distinctions between types of restraints on religious exercise, but rather is directed against any form of governmental action that frustrates or inhibits religious practice."[110] Much of Brennan's opinion discussed the evidence of a burden on free exercise. Brennan argued that precedent indicated once the Native Americans had shown a risk to their religious practices existed, the government had to show a compelling interest to build a road and harvest timber on the land subject to religious practice. From the evidence he concluded that the government had not met its burden of justification.[111]

No case of the first four years of the Rehnquist Court better illustrates coalitional conflict on free exercise issues than *Employment Division v. Smith*.[112] At issue was whether the free exercise clause protected the use of the mild hallucinogen peyote as part of a religious ceremony by a member of the Native American Church. Church members Alfred Smith and Galen Black had been fired from positions as counselors in a drug rehabilitation program after admitting the religious use of peyote. Thereafter, an official of the state unemployment compensation agency determined that peyote use was

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108. O'Conner stated:

> This does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions. The crucial word in the constitutional text is "prohibit".

Id. at 450.

109. *Id.* at 451-53.

110. *Id.* at 459 (Brennan, J., dissenting).

111. *Id.* at 474-76 (Brennan, J., dissenting).

112. 494 U.S. 872 (1990).

"misconduct" which, according to a state statute, required a determination of ineligibility for unemployment compensation. After extensive preliminary litigation, the Oregon Supreme Court had determined the free exercise clause exempted peyote use by members of the Church from prosecution under Oregon laws against possession and use of controlled substances.[113] Scalia's majority opinion essentially exempted state laws prohibiting drug use for religious purposes from strict scrutiny and the compelling state interest standard under the free exercise clause.

Scalia began by discussing precedents in which the free exercise clause was used to protect categories of religious belief, profession of belief, and performance or abstinence from physical acts. He then distinguished the precedents from his position that drug use as part of a religious ceremony could not excuse violations of a neutral, generally applicable criminal law not specifically directed at a religious practice. He concluded that precedents held that physical acts performed for religious reasons, like peyote consumption, could be regulated by laws not specifically designed to prohibit a religious practice.[114]

Scalia further argued the Court had made exceptions to this principle only when a neutral, generally applicable law involved free exercise in conjunction with freedom of speech or freedom of the press. Except for these "hybrid" situations, he made it clear that the breadth of the free exercise guarantee could be fixed by statutes designed to prohibit socially harmful conduct.[115] The legislature could define socially harmful conduct unless it singled out the conduct of a specific religious association for criminal penalization.

Further limiting the content of free exercise, Scalia refused to extend the holdings of *Sherbert v. Verner* and other unemployment compensation cases in which strict scrutiny was employed to Smith's case, citing the decisions in *Bowen v. Roy*, *Estate of Shabazz*, and *Northwest Indian Cemetery*. Unlike O'Connor's attempt to distinguish the incidental harm of road building to free exercise in *Northwest Indian Cemetery* from the constitutionally harmful "coercive"

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113. Smith v. Employment Div., 721 P.2d 445 (1986); Black v. Employment Div., 721 P.2d 451 (1986); Employment Div. v. Smith, 485 U.S. 660 (1988) (remand to Oregon Supreme Court to determine if religious use of peyote was legal in Oregon); Smith v. Employment Div., 763 P.2d 146 (1988).

114. According to Scalia, "[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." Employment Div. v. Smith, 494 U.S. at 878-79.

115. *Id.* at 881-82.

actions in *Hobbie* and *Frazee*, Scalia distinguished the free exercise cases demanding strict scrutiny analysis from those which demanded only the use of the reasonableness criteria in a different way. The compelling governmental interest test, he held, was inapplicable to challenges that did not require an examination of individual circumstances (as in the unemployment compensation cases). In contrast, the application of "across-the-board criminal prohibitions on a particular form of conduct" cannot be exempted because of free exercise claims.[116] The result is that the compelling interest test does not apply to free exercise of religion claims when general criminal laws curtail practices that an individual or religious association contends are religiously commanded.

Scalia presented two reasons for the Court's refusal to protect Smith's religious exercise, one based on "constitutional tradition" and one on "common sense."[117] In his constitutional tradition argument, Scalia stated that Smith's claim was not comparable to those race and speech cases in which strict scrutiny and the compelling interest test had been applied in the past. "What it [the test] produces in those other fields—equality of treatment, and an unrestricted flow of contending speech—are constitutional norms; what it would produce here—a private right to ignore generally applicable laws—is a constitutional anomaly."[118]

His common sense argument contended that to allow exemptions under a compelling interest test would cause "the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind." The result would be "courting anarchy."[119] Illustrating his position with a series of examples of the dangers of the use of the compelling interest standard, he also claimed it would force judges into the constitutionally unsound practice of deciding if a religious practice was so central to a faith that governments had no compelling interest to regulate it.[120] Instead, he concluded, it is better to leave some religious practices relatively disadvantaged than to leave religions to become a law unto themselves or subject to the consideration of the merits of their beliefs by judges.[121] *Smith* might well mark the beginning of a direct effort by Rehnquist, Scalia, Kennedy, and White to reduce the categories of

116. *Id.* at 882-85.
117. *Id.* at 885.
118. *Id.* at 886.
119. *Id.* at 888.
120. *Id.* at 886-89.
121. *Id.* at 890.

claims deserving higher-tier strict scrutiny/compelling interest analysis. In any event, it certainly marks the extension of reasonableness discourse in a new fashion as the scope of strict scrutiny is confined to a select set of free exercise cases.[122]

Whereas Scalia attempted to distinguish in general terms the free exercise cases demanding strict scrutiny analysis from those which he found only required the use of the deferential reasonableness standard, O'Connor in a concurring opinion took a more moderate tack. She attempted to distinguish the road building in *Northwest Indian Cemetery* from the "coercive" government actions in cases like *Hobbie* and *Frazee*. She contended that settled doctrine dating from *Carolene Products*[123] had required strict scrutiny in free exercise cases. Although her *Northwest Indian Cemetery* opinion indicated a desire to limit the types of governmental activity subjected to strict scrutiny under the free exercise clause, in *Smith* she stated that, "Recent cases have instead reaffirmed that [compelling interest] test as a fundamental part of our First Amendment doctrine," and "The cases cited by the Court signal no retreat from our consistent adherence to the compelling interest test."[124] Despite loyalty to the strict scrutiny concept, she upheld the ban on peyote consumption. She found that the ban was needed to further the state's compelling interest in reducing the harms of drug use and drug trafficking.[125]

Brennan, Marshall, and Blackmun agreed with O'Connor's justifications for the use of the compelling state interest test, but dissented from her assessment of the harm of peyote use. Blackmun wrote that the state had simply not provided enough solid documentary evidence about the harms of peyote use to prove a compelling interest.[126] Blackmun also criticized Scalia's assumption that requiring an exception to the criminal law to permit peyote consumption as part of a religious observance would oblige a host of other exemptions to the criminal law. Calling such an argument "speculative," he maintained the courts still should be able to distinguish sincere religious belief from false claims that might endanger public health

122. Thus, this case extends the kinds of free exercise claims held to be exempt from strict scrutiny and subject to rationality review. Previously, exemption from strict scrutiny had been limited to the special contexts of prisons, O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987), and the military, Goldman v. Weinberger, 475 U.S. 503 (1987). *See* Galloway, *supra* note 97, at 876-77.

123. United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938).

124. Employment Div. v. Smith, 494 U.S. at 900 (O'Connor, J., concurring).

125. *Id.* at 905-07 (O'Connor, J., concurring).

126. *Id.* at 909-14 (Blackmun, J., dissenting).

and safety or promote drug trafficking.[127]

Although the compelling interest test has generally led to the conclusion that a challenged statute violates the Constitution, the test has also been used to uphold government action, particularly in free exercise cases.[128] During the first four years of the Rehnquist Court, Brennan and Marshall generally used this standard to defend religious minorities, but they also used it to reject a free exercise claim in a federal tax case.[129] Marshall's majority opinion upheld denial of tax deductions for selected auditing and training services provided by the Church of Scientology, rejecting establishment clause[130] and free exercise claims. Marshall concluded that the denial of the tax deductions only slightly burdened the individual. Using strict scrutiny principles, he found that administration of a sound tax system constituted a compelling governmental interest, and that the claimed exemption neither stemmed from a doctrinal obligation nor prevented the fulfillment of a religious duty.[131] O'Conner's dissenting opinion did not address the free exercise issue.

In another taxation case, Brennan wrote a majority opinion striking down an exemption from state sales tax afforded religious publishers on establishment clause grounds.[132] Addressing free exercise claims as well, Brennan noted that no claim of an interference with free exercise had been argued by a religious organization, and, in any case, he did not find the act creating a precondition that prevented people from observing their religious tenets. Applying a balancing test from *United States v. Lee*,[133] he found that the sales tax did not prevent the publisher's religious activity or the observation of religious tenets, offered "little danger" of subjecting the religious publication to undue burdens damaging its missionary activity, and was not a covert attempt to curtail religious exercise.[134] The other opinions in this case once again did not address the free exercise

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127. *Id.* at 916-21 (Blackmun, J., dissenting).

128. Galloway, *supra* note 97, at 874-75.

129. Hernandez v. Comm'r, 490 U.S. 680 (1989).

130. *See infra* notes 170-71 and accompanying text.

131. 490 U.S. at 698-700.

132. Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989). *See infra* notes 155-60 and accompanying text.

133. 455 U.S. 252, 257-58 (1984).

134. 489 U.S. 1, 24-25. Brennan rejected some of the sweeping language in Murdock v. Pennsylvania, 319 U.S. 105, 106-14, (1943) and Follett v. Town of McCormick, 321 U.S. 573, 575-77 (1944), that had implied that the free exercise clause required a ban on the taxation of any religious practices. In these cases the Court held that the clause prohibited any flat license and occupation taxes on door-to-door solicitation and sales of religious materials by itinerant evangelists.

issue. In a final taxation case with free exercise dimensions, O'Connor for a unanimous court rejected expansive readings of the free exercise clause precedents and upheld a California law imposing state sales and use taxes on retail sales of religious merchandise by an out-of-state religious organization.[135] Since the tax was not on the right to disseminate religious ideas or beliefs but on retail sales of property and the storage and consumption of personal property, it did not burden the free exercise of sincere religious beliefs. Any decrease in the money available for religious activity, any detriment to the dissemination of religious ideas, information, or beliefs, and any violation of the sincere religious beliefs of the Ministry members was deemed constitutionally insignificant.[136] O'Connor did not use the heightened scrutiny language in this case, but these taxation cases make clear that not all statutes giving rise to free exercise claims will be subjected to strict scrutiny and struck down.

IV. Religious Establishment Claims

In contrast to freedom of expression and free exercise cases, claims that governmental action violates the establishment clause of the First Amendment generally have not involved explicit invocation of the language of strict scrutiny or the compelling governmental interest test. Rather, most Rehnquist Court cases under the establishment clause have applied the three-prong test of *Lemon v. Kurtzman*[137] or variations on the *Lemon* theme, such as Justice O'Connor's position that what the Constitution prohibits is governmental "endorsement" of religion.[138] Still, there are parallels between establishment clause cases and those raising other First Amendment claims because *Lemon* employed language suggesting an intensified means-ends scrutiny that closely parallels strict scrutiny.[139] Each part of the *Lemon* test seems to put the burden of justification on government: First, the statute must have a secular legislative purpose; second its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an "excessive governmental entanglement with religion."[140]

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135. Jimmy Swaggart Ministries v. Board. of Equalization of Calif., 493 U.S. 378 (1990).

136. *Id.* at 389-92.

137. 403 U.S. 602 (1971).

138. Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

139. *See* Russell W. Galloway, *Basic Establishment Clause Analysis*, 29 Santa Clara L. Rev. 845, 846, 851-53 (1989); Galloway, *Means-End Scrutiny*, *supra* note 19, at 453.

140. *Lemon*, 403 U.S. at 612-13.

Chief Justice Burger's *Lemon* opinion also called for "close scrutiny" of the "degree of entanglement" involved in the relationship between state government and religious institutions.[141] In short, *Lemon* invites but does not necessarily compel an approach to standards of review and burdens of proof directly parallel to strict scrutiny.

Establishment clause cases also differ from other First Amendment cases in that there is less agreement among the justices on basic principles, leading to less stable coalitions than in freedom of expression or free exercise areas. The differences among the justices in establishment clause cases tend to relate directly to burden of proof questions, most frequently whether the evidence presented supports the conclusion that the challenged law has violated one or more of the prongs of the *Lemon* test. During the first four years of the Rehnquist Court era, Justices Brennan, Marshall, and Blackmun usually formed a coalition that interpreted the *Lemon* test to demand a form of intensified scrutiny that put the burden on the state to produce evidence that a challenged governmental practice did *not* provide support for religion. Taking almost any legislative efforts on behalf of religion as indicative of a religious establishment, they required the state to provide very strong (or what we might call "compelling") evidence that the prongs of the *Lemon* test were not violated. In contrast to this "separationist" discourse about the meaning of the establishment clause,[142] Rehnquist, Scalia, and Kennedy supported efforts by government to accommodate the interests of religious bodies against the separationist position. What we will call their "accommodationist" argument read *Lemon* as demanding less intensified scrutiny than the Brennan-Marshall-Blackmun bloc. In their view, governments could accommodate some religious activities if some evidence indicated that it was reasonable for the government to benefit religious organizations. This "rationality review" was normally deferential to governmental policies unless governmental coercion in support of a religion was shown. Applying this deferential approach, Justice Kennedy and Chief Justice Rehnquist invariably opposed the "separationist" position, and Justice Scalia supported separation in only one case.[143] Justices White, O'Connor, and Stevens voiced more idiosyncratic approaches to establishment disputes.

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141. *Id.* at 614.

142. FRANK J. SORAUF, THE WALL OF SEPARATION 7-9 (1976); Kobylka, *supra* note 10, at 549.

143. Hernandez v. Commissioner, 490 U.S. 680 (1989).

In *Edwards v. Aguillard*[144] Brennan's opinion for the Court held that the purpose of Louisiana's "Creation Science Act" was religious and violated the secular purpose prong of the *Lemon* test. Brennan's analysis centered on his consideration of statements indicating the legislature's intent in passing the Act. Although the review of the evidence of legislative intent was brief and focused on the statements of the Act's sponsor, it allowed him to conclude that the legislature intended "to restructure the science curriculum to conform with a particular religious viewpoint."[145]

In dissent, Rehnquist and Scalia adopted a very deferential reasonableness standard for the review of evidence about the secular purpose criterion of *Lemon*. Much of Scalia's opinion is devoted to arguing that the Court's majority misread the Louisiana legislature's intent. Taking the position that the majority justices ignored the plain meaning of statutory language indicating a secular purpose for the law, he concluded that the legislative history did not provide strong enough evidence to find a violation of the first prong of the *Lemon* standard.[146] Especially in the final sections of his opinion, Scalia also criticized the secular purpose standard itself, urging a deferential posture for the Court.[147] Clearly, he was unwilling to strike down a law he found to be a reasonable effort to include a theory with religious origins in a public school curriculum.

Rehnquist, in *Bowen v. Kendrick*[148] applied *Lemon* directly to evaluate the constitutionality of the Adolescent and Family Life Act provisions on grants to religious organizations for the operation of programs under the statute.[149] His comparison of evidence to the *Lemon* prongs concentrated on defining how the statutory language satisfied the *Lemon* criteria. He read the statutory language to be facially neutral and the statute to be constructed so as to prevent assistance to "pervasively sectarian" organizations.[150] The opinion thus viewed the law as providing, by using organizations with some connections to religious bodies, a neutral, reasonable means of providing child and family services. He failed to consider any evidence of the law's intent in regard to religious bodies, the message about religion that it communicated, or the implications of the indirect en-

144. 482 U.S. 578 (1987).
145. *Id.* at 593.
146. *Id.* at 610-36 (Scalia, J., dissenting).
147.. *Id.* at 626, 636-40 (Scalia, J., dissenting).
148. 487 U.S. 589 (1988).
149. *Id.* at 602.
150. *Id.* at 610.

tanglement or possible future entanglement that it might engender. Also, Kennedy, joined by Scalia, offered a brief concurring opinion to stress that the facial neutrality of the Act between grantee institutions that were not pervasively sectarian should be the only object of inquiry.[151] They would limit evidence about unreasonable governmental activity and make it impossible to scrutinize governmental practices closely in establishment cases.

In *Bowen v. Kendrick*, Blackmun wrote a dissenting opinion, which Brennan, Marshall, and Stevens joined. The opinion centered on two issues: the majority's definitions of sectarian institutions and its application of *Lemon*. First, Blackmun argued that the majority used a narrow, "pervasively sectarian" definition of the kinds of institutions that could not receive federal aid. This definition, he contended, prevented the consideration of evidence about the institution and the use of aid.[152] Even so, under statute's terms he found funds could go to pervasively sectarian institutions, thus creating a substantial risk of promotion of religion contrary to *Lemon*.[153] Second, he concluded that the evidence showed a violation of the entanglement prong. Because the statute provided money to some pervasively sectarian institutions, the government had to engage in intrusive inspection that had an entangling character in order to track the use of the money and prevent the subsidization of religion.[154] In short, there was "compelling" evidence of an establishment clause violation.

Writing for the Court in *Texas Monthly v. Bullock*,[155] Brennan struck down a Texas law exempting religious publications from the state sales tax. Using all prongs of *Lemon* to guide his establishment clause analysis, Brennan held that the exemption lacked a secular purpose and had the effect of advancing religion by giving it preferential treatment unrelated to a legitimate secular end.[156] Also, he held that the exemption produced greater entanglement than its denial because the state would be forced to evaluate whether a publication qualified for the exemption rather than just collect the tax from the publication.[157] In short, he found compelling evidence that the exemption amounted to governmental sponsorship of religion. In *Texas Monthly*, Justice Scalia, joined by Rehnquist and Kennedy,

151. *Id.* at 624 (Kennedy, J., concurring).
152. *Id.* at 630-33 (Blackmun, J., dissenting).
153. *Id.* at 648 (Blackmun, J., dissenting).
154. *Id.* at 649-51 (Blackmun, J., dissenting).
155. 489 U.S. 1 (1989).
156. *Id.* at 18.
157. *Id.* at 20.

dissented in an effort to defend the constitutionality of exempting religious materials from sales taxation. The establishment clause argument again applied *Lemon* in a conscious effort to accommodate religious practices. Scalia argued that the law had a secular legislative purpose in its effort to accommodate, rather than to promote or endorse, a religious practice.[158] Further, he contended that the law did not subsidize a religion and that its primary effect was not to divert public or private monies to religious bodies.[159] He regarded the government's collection of the tax, required by the majority opinion, to be an entanglement greater than any decision about whether a publication was secular or religious, as required by the statute. Scalia thus offered an opinion that is deferential to governmental claims and used a discourse claiming the Court's majority was hostile to a law expressing popular values and traditions regarding religion.[160]

In *County of Allegheny v. ACLU*,[161] the Court offered five opinions generating a confusing pattern of coalitions about whether the display of a creche inside and a menorah outside public buildings in Pittsburgh violated the establishment clause. Blackmun wrote the plurality opinion, and Brennan supplied a concurring and dissenting opinion, joined by Marshall and Stevens. For the Court, Blackmun upheld the constitutionality of the display of the menorah but not the creche. Brennan found both displays violative of the establishment clause.

Blackmun used *Lemon* as the basis of his analysis, but his opinion also drew on the "endorsement of religion" standard voiced by O'Connor in *Lynch v. Donnelly*.[162] He considered the O'Connor concurrence to provide "a sound analytical framework for evaluating governmental use of religious symbols"[163] that the Court's opinion in *Lynch* lacked. Blackmun concluded from the evidence that the nature of the creche display endorsed Christian doctrine and thus created a prima facie violation of the establishment clause.[164] Although Blackmun did not directly assign a burden of proof, his opinion clearly assumes that the County bore the burden of proving a lack of endorsement of religion. Unpersuaded by the County's argument,

158. *Id.* at 40-41 (Scalia, J., dissenting).
159. *Id.* at 42-43 (Scalia, J., dissenting).
160. *Id.* at 43-44 (Scalia, J., dissenting).
161. 492 U.S. 573 (1989).
162. 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).
163. County of Allegheny v. ACLU, 492 U.S. 573, 595 (1989).
164. *Id.* at 601-02.

Blackmun found compelling evidence of endorsement in the location of the creche and the distinctively nonsecular nature of its exhibition.[165] He then argued that the establishment clause required strict scrutiny of any governmental practice that indicated a "denominational preference."[166] With regard to the menorah, he concluded that the association of its display with secular holiday symbols like a large Christmas tree diminished the possibility that it would be taken as an endorsement of Judaism.[167]

Brennan's concurring and dissenting opinion in this case focused on the display of the menorah. He contended that Blackmun's discussion of both the Christmas tree and the context of the display of the menorah was an effort to transform religious into holiday symbols. Also, he argued, although the display presented the symbols of two religions and contained a sign evidencing concern for religious pluralism in the community as an element of American liberty, it still was a promotion of religion that could not survive his implied strict scrutiny approach to government polices alleged to violate the establishment clause.[168]

In the *Allegheny County* case Kennedy wrote an opinion, joined by Rehnquist, White, and Scalia, arguing for the constitutionality of both displays. Kennedy considered the only issue in the case to be the validity of the displays under the principal effects prong of *Lemon*. His argument rested on a review of evidence finding that the neither the creche nor the menorah was "coercive" in its principal effects. By coercive effects Kennedy meant that neither display provided tangible benefits to a religion by compelling religious actions, interfering with a religious practice, forcing persons to support a religion, or establishing the symbols of a religion so obtrusively that the government appeared obviously to be engaging in religious proselytization. He found these displays were only a reasonable symbolic recognition or passive acknowledgement by government of the religious aspects of a holiday with both secular and religious components. He deemed it unrealistic to regard the displays as an effort to establish a religion.[169] The thrust of his formulation of a "coercion" criterion was not only to construct a new substandard in establishment clause jurisprudence, but also to require critics of the display to bear the burden of showing harmful or coercive effects. In contrast to

165. *Id.* at 599-600.
166. *Id.* at 609.
167. *Id.* at 613-21.
168. *Id.* at 637-46 (Brennan, J., concurring and dissenting).
169. *Id.* at 655-67 (Kennedy, J., dissenting).

other applications of the *Lemon* standards, Kennedy's approach would relieve the government of justifying its accommodationist impulses, thus suggesting a deferential posture similar to review under a rational basis standard.

Although Justices Brennan, Marshall, and, often, Blackmun applied a "compelling evidence" criterion and voted to strike down statutes affecting religions, sometimes they found adequate evidence of a compelling reason for the statute or for unique treatment of the statute. Despite claims of establishment, they legitimated some taxation, educational, and employment practices against contentions of establishment through an examination of evidence under the *Lemon* criteria. Marshall's opinion for the Court in a federal tax case upheld a denial of income tax deductions sought by members of the Church of Scientology.[170] Using *Lemon*, he held that distinctions in federal tax law between permissible deductions for gifts to religions and nondeductible fees for tangible products and services were constitutional. The deduction rules did not prefer one religion over others, advance or inhibit religion, or excessively entangle church and state.[171] These justices also supported taxation of the profit-making activities of a religious organization by voting for Justice O'Connor's opinion in *Jimmy Swaggart Ministries v. Board of Equalization of California*.[172]

Marshall and Brennan also joined the majority in upholding the provisions of the federal Equal Access Act that permitted a religious organization called the Christian Club to meet in a public school.[173] However, Marshall's opinion urged that the school administration must take affirmative steps to dissociate the school and its personnel from the Club and to disclaim any intimation of endorsement of the Club's religious goals.[174] Kennedy's concurring opinion with Scalia in this case furthered his promotion of the coercion concept. He argued that the school merely recognized the Christian Club, and that there was no coercion by school officials for students to associate with or participate in the activities of the club. The primary effect of the law allowing the Club, therefore, was not to coerce religious behavior.[175] Also, the opinion attacked O'Connor's use of an "endorsement" criterion to evaluate, under the second prong of

170. Commissioner v. Hernandez, 490 U.S. 680 (1989).
171. *Id.* at 695-96.
172. 493 U.S. 378 (1989).
173. Board of Educ. v. Mergens, 110 S. Ct. 2356 (1990).
174. *Id.* at 2382 (Marshall, J., concurring in judgment).
175. *Id.* at 2376-77 (Kennedy, J., concurring).

Lemon, the principal effects of a policy.[176] Although Kennedy also offered this criticism in the creche-menorah case,[177] its assertion in *Mergens* illustrated the lack of coalitional behavior among Ronald Reagan's appointees on establishment issues.

In *Corporation of the Presiding Bishop v. Amos*,[178] the Court considered whether a church-owned corporation could discriminate on the basis of religion when hiring or firing persons from jobs that did not involve the propagation of the religion. Provisions of the Civil Rights Act of 1964 had exempted religious organizations from bans on job discrimination, but the appellee argued that the provision had the effect of benefitting religious employers, thus running afoul of the second (principal effects) prong of *Lemon* and violating the establishment clause. The Court, in an opinion by White, rejected this argument. After beginning with an explicit acceptance of the constitutionality of accommodation of religious practices by government,[179] White then applied the *Lemon* test to uphold the Act allowing a religious organization to use religion as a criterion for firing an employee.[180] He concluded that the law had a secular purpose of preventing governmental interference in a religion, that its effects did not advance the proselytization of the religion, and that it worked to avoid potential entanglements. He then noted that the law was "rationally related to the legitimate purpose of alleviating significant governmental interference with . . . religious missions."[181] This rationality language clearly indicates that he did not conceive of *Lemon* as imposing the equivalent of a compelling interest standard and requiring government to provide evidence justifying its efforts to accommodate religious practices. Brennan's concurring opinion, joined by Marshall, avoided the use of the language of scrutiny. Instead, Brennan sought to create a categorical exemption from strict scrutiny for the nonprofit activities of religious organizations. The use of such an automatic rule, he argued, would avoid any entanglement of the courts in the operations of the religious body and would keep the courts from chilling the free exercise of religion by the organization.[182] Justice O'Connor, who had developed her own inter-

176. *Id.* at 2377-78 (Kennedy, J., concurring).
177. County of Allegheny v. ACLU, 492 U.S. at 655-79 (Kennedy, J., dissenting).
178. 483 U.S. 327 (1987).
179. *Id.* at 334.
180. *Id.* at 335-37.
181. *Id.* at 339.
182. *Id.* at 340 (Brennan, J., concurring in judgment).

pretation of the *Lemon* standards,[183] restated her desire to inquire into whether the governmental action is an "endorsement" of a religion.[184] The endorsement standard would minimize inquiry into evidence about legislative purposes and focus instead on the nature of the message communicated by governmental action ("endorsement") rather than speculation about the principal effects of the action. As it emerged, O'Connor's endorsement criterion did not shift the burden of proof away from the government when establishment clause violations were at issue. However, it did limit the introduction of evidence to whether there was an endorsement message in a governmental policy. Evidence about the other effects of a policy, like citizen behavior, was to be excluded from consideration. In this case she found that the civil rights law provision allowing a religious organization to fire an employee because of religious considerations was not a message of endorsement of a religious principle or practice by government.

O'Connor's concurring opinion in *Bowen v. Kendrick*[185] reiterated that she would use the endorsement criterion to gauge the principal effect of the Adolescent and Family Life Act granting procedures. She concluded that the grants to religious organizations under the Act did not constitute a message of endorsement. Her concurring opinion in *County of Allegheny v. ACLU,* the Pittsburgh holiday display case was largely an exchange with Justice Kennedy over the relative value of the endorsement and the coercion criteria. She contended that the endorsement test was not inconsistent and did not manifest a hostility toward religion, especially since she found no endorsement of religion when she applied it to the menorah display issue.[186]

The force of O'Connor's position won converts. Blackmun used the terminology of endorsement in two of his opinions,[187] moving away from the approach of Brennan and Marshall. In *Board of Education v. Mergens*,[188] O'Connor's opinion for the Court used her endorsement reading of the principal effects prong of *Lemon*. Here she concluded that the recognition of the Christian Club by school

183. Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring); Wallace v. Jaffree, 472 U.S. 38, 67 (O'Connor, J., concurring in judgment).

184. Corporate Pres. Bishop v. Amos, 483 U.S. at 349 (O'Connor, J., concurring).

185. 487 U.S. 589, 622 (1988) (O'Connor, J., concurring).

186. County of Allegheny v. ACLU, 492 U.S. at 627-37 (O'Connor, J., concurring).

187. County of Allegheny v. ACLU, 492 U.S. at 593; Corp. Pres. Bishop v. Amos, 483 U.S. at 346 (Blackmun, J., concurring in judgment).

188. 496 U.S. 226 (1990).

officials as required by the Equal Access Act was not an endorsement of the Club's views, nor was a message of endorsement communicated to students. She also upheld the constitutionality of the Club under the secular purpose and entanglement prongs of *Lemon*.[189] Interestingly, the concurring opinion by Marshall used the terminology of endorsement, even as it sought to broaden the kind of evidence admissible to show endorsement.[190]

In another case with establishment contours, O'Connor wrote the unanimous opinion of the Court, as in the *Swaggart* case. In considering the establishment clause aspects of the taxation of the sales of retail goods by Jimmy Swaggart's religious organization, she avoided the endorsement issue related to the first two prongs of *Lemon* in concluding that there was no entanglement of the state in religion in a manner violative of these standards.[191] However, in *Hernandez* her dissenting opinion, joined by Scalia, argued that denial of the Church of Scientology members' tax deduction violated the idea of neutral treatment of religious practices by government.[192] She did not refer to the *Lemon* test and her endorsement criterion in this dissent. Finally, her votes provided support for the separationist position in the Creation Science case and in *Texas Monthly*.[193]

Justice White often chose to follow an independent path in establishment clause cases. In the Louisiana Creation Science case, Justice White concurred with the separationist result. However, unlike Brennan's majority opinion which independently explored the legislature's intent, White relied on lower court determinations of legislative purpose and concluded that the act violated the first prong of *Lemon*. In *Texas Monthly*, White's concurring opinion indicated he would have avoided the establishment issue by finding the differential sales taxation policy to be a denial of freedom of the press. With the exception of these two opinions, White was likely to defer to governmental accommodations of religion. Through his opinion in *Presiding Bishop* and his votes in *Bowen v. Kendrick*, the creche-menorah case, *Hernandez*, and *Mergens*, White contributed to the accommodationist outcomes of these decisions.

Justice Stevens pursued a different interpretative track. In his opinion in *County of Allegheny*, he refused to differentiate between

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189. *Id.* at 248-53.

190. *Id.* at 263 (Marshall, J., concurring in judgment).

191. Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378, 397 (1990).

192. Hernandez v. Commissioner, 490 U.S. 680, 712 (1989) (O'Connor, J., dissenting).

193. Edwards v. Aguillard, 482 U.S. 578 (1987); Texas Monthly v. Bullock, 489 U.S. 1 (1989).

the constitutionality of the displays of the creche and menorah. Stevens' standards for the review of evidence did not rest on the *Lemon* test or its variants. Instead, he contended that the establishment clause contained a strong presumption against any display of religious symbols on public property. Further, the meaning of the symbols could not be diminished by the presence of secular symbols or by the symbols of other religions.[194] His dissenting opinion in *Mergens* considered the issue as primarily one of freedom of expression. His establishment clause comments in the case were largely directed at chastising Congress for forcing the Court to consider religion in the schools, not at any position voiced by the other justices.[195] He voted for separationist positions in the Creation Science case, *Kendrick,*and *Texas Monthly*, but he voted for the accommodationist position in *Presiding Bishop*, *Hernandez*, and *Swaggart.*

As is illustrated by this review of opinions, no pattern of intensified scrutiny discourse and evidentiary analysis dominated the Rehnquist Court's consideration of establishment clause cases. Only Brennan and Marshall consistently supported standards for the evaluation of evidence akin to the strict scrutiny standard applied in other First Amendment cases. On the other hand, Kennedy, Scalia, and Rehnquist pursed an approach to establishment clause cases that came close to converting the *Lemon* test to a variant of rationality review. To clarify the underlying principles of *Lemon*, O'Connor formulated her own "endorsement" test, a standard that in practice often resulted in upholding government actions with religious links. Although White tended to support the Rehnquist-Kennedy-Scalia coalition in most cases and Blackmun and Stevens leaned toward Brennan-Marshall position, all three appeared somewhat unsettled about the standard of evidentiary review in their decisions.

V. Racial Equality and the Rehnquist Court

The striking thing about the racial equal protection discourse of the Rehnquist Court is that all justices used intensified scrutiny language, but differed over the precise standard to be applied and the application of standards. Although multiple and shifting coalitions marked the handful of racial equal protection decisions during the first four years of the Rehnquist Court, there was a general pattern to the justices' internal divisions. Brennan, Marshall, and

194. County of Allegheny v. ACLU, 492 U.S. 573, 650-55 (1989) (Stevens, J., concurring and dissenting).

195. Board of Education v. Mergens, 110 S. Ct. at 2383 (Stevens, J., dissenting).

Blackmun consistently applied heightened scrutiny language in ways that gave wide latitude to courts and legislative bodies that sought to overcome the effects of past discrimination through affirmative action plans and programs. Meanwhile, several other justices—including the four Reagan appointees—supported a stringent version of the strict scrutiny standard that would prohibit or severely restrict the use of race-conscious remedial plans. Much of the debate focused on questions of evidence, particularly the nature of evidence of past discrimination that would be required to justify a race-conscious remedial program. Similar patterns of coalition formation and evidentiary debates also marked the more numerous statutory decisions bearing on questions of equality.[196]

During its first four terms, the Rehnquist Court issued four important sets of opinions about standards of review and racial equality, three in affirmative action cases[197] and one in an equal protection challenge to the operation of Georgia's capital punishment statutes.[198] The first set appeared in *United States v. Paradise*, where a white trooper challenged a court-ordered remedial procedure for the promotion of Alabama state troopers which gave preference to black officers until approximately 25 percent of a rank was composed of black troopers. Brennan, joined by Powell, Marshall, and Blackmun, upheld the remedial plan. Without *committing* himself to strict scrutiny in affirmative action cases, Brennan concluded that the preferential remedy satisfied the compelling governmental interest test applied in some earlier affirmative action opinions.[199] Referring explicitly to the Court's ongoing debate over standards of review, Brennan declared:

> [A]lthough this Court has consistently held that some level of elevated scrutiny is required when a racial or ethnic distinction is to be made for remedial purposes, it has yet to reach consensus on the appropriate constitutional analysis. We need not do so in this case, however, because we conclude that the relief ordered survives even strict scrutiny analysis: it is "narrowly tailored" to serve a "compelling [governmental] purpose.[200]

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196. *See infra* note 249.

197. United States v. Paradise, 480 U.S. 149 (1987); City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989); Metro Broadcasting v. FCC, 497 U.S. 547 (1990).

198. McCleskey v. Kemp, 481 U.S. 279 (1987).

199. Sheet Metal Workers v. EEOC, 478 U.S. 421, 480 (1976); *Id.* at 484-85 (Powell, J., concurring in judgment); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986) (Opinion of Powell, J.); University of Calif. Regents v. Bakke, 438 U.S. 265, 291 (1978) (Opinion of Powell, J.).

200. *Paradise*, 480 U.S. at 166-67. Brennan had used similar language in upholding

Brennan justified his conclusion about the existence of a compelling governmental interest by reciting the record of state hostility to the hiring and promotion of black troopers.[201] Further, he argued that precedent required the consideration of four factors to establish that the remedial promotion plan was narrowly tailored to address the discriminatory nature and effects of past hiring and promotion practices. The four factors were the "necessity for the relief and the efficacy of alternative plans," "the flexibility and duration of the relief," the relationship of the numerical goals of the plan to the relevant labor market, and "the impact of the relief on the rights of third parties."[202] After a review of the evidence, Brennan concluded that the plan was the only reasonable remedy, was not an inflexible quota and had a defined end-point, reflected a careful consideration of labor markets by the District Court, and was temporary and did not result in disproportionate harm to the interests of white troopers.[203] Thus, the plan was narrowly tailored.[204]

Powell wrote a concurring opinion that also used the strict scrutiny and compelling interest language, but added a fifth factor to the consideration of whether the plan was narrowly tailored, the "availability of waiver provisions if the hiring plan could not be met."[205] He found that this as well as the other four factors were satisfied by the District Court's plan. Stevens' concurring opinion supported the "broad and flexible authority" of the District Court to issue the remedies. He did not employ the language of narrow tailoring and its concomitant "factors" criteria.[206]

O'Connor, joined in dissent by Rehnquist, Scalia, and, in part, by White, also adopted strict scrutiny, but she contended that "the Court adopts a standardless view of 'narrowly tailored' far less strin-

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against a constitutional challenge a federal court order imposing an affirmative action plan on a union with a long history of racial discrimination. *Sheet Metal Workers*, 478 U.S. at 480 (Opinion of Brennan, J.). By applying the strict scrutiny standard that Powell had consistently advocated in earlier opinions, Brennan was able to gain Powell's support for the plurality opinion in *Paradise*.

201. *Id.* at 167-70.

202. *Id.* at 171.

203. *Id.* at 171-83.

204. *Id.* at 185.

205. *Id.* at 187 (Powell, J., concurring). Powell had endorsed the availability of waiver as an element of an affirmative action plan deemed necessary to promote the compelling governmental interest in ameliorating the effects of past discrimination when he voted to uphold a 10 percent "set-aside" for minority business enterprises under a federal contract grant program. Fullilove v. Klutznick, 448 U.S. 448, 515 (Powell, J., concurring).

206. 480 U.S. at 189 (Stevens, J., concurring).

gent than required by strict scrutiny."[207] She directed her primary criticism at the analysis of the first of the four factors Brennan used to evaluate whether the remedy was narrowly tailored. She argued that several alternatives to racial preferences, like fines and contempt citations, could have compelled compliance with the federal court decree to end discrimination in promotions.[208] Showing sympathy for the white troopers, she preferred an alternative having a "lesser effect" on their rights.[209]

The coalition supporting O'Connor's view of racial equal protection remedies did not find a majority in *Paradise*, but the case signified the attention that the Court would pay to the validity of the evidence supporting claims of past or present violations of the equal protection clause. Although it is not an affirmative action case, the discussion of evidentiary requirements in the death penalty case of *McCleskey v. Kemp*[210] sheds light on the treatment of evidentiary issues by the Rehnquist Court. In this case an African-American defendant (McCleskey) claimed racial discrimination existed in the Georgia capital sentencing process. Much of Powell's opinion, joined by Rehnquist, White, O'Connor, and Scalia, addressed the issue of evidence. Powell concluded that statistical evidence of discrimination in the administration of the penalty did not sufficiently prove a violation of the equal protection clause. He argued that the clause demanded exceptionally clear proof, proof "that the decision-makers in *his* case acted with discriminatory purpose."[211] According to Powell, McCleskey had offered "no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence."[212] A statistical study of capital sentencing patterns, he judged, failed to establish whether the circumstances of this particular death sentence were biased by racial considerations. Powell, in dicta, also speculated that the evidentiary approach proffered by McCleskey could lead to use of statistical studies of sentencing bias to upset existing decisions about every category of criminal conviction.[213] He seemed to be unwilling to tolerate such a potential disruption. Therefore, he suggested that, absent direct evidence of racial bias in a case, legislatures ought to remedy any sentencing bias dis-

207. *Id.* at 197 (O'Connor, J., dissenting).
208. *Id.* at 199-201 (O'Connor, J., dissenting).
209. *Id.* at 201 (O'Connor, J., dissenting).
210. 481 U.S. 279 (1987).
211. *Id.* at 292 (emphasis in original).
212. *Id.* at 292-93.
213. *Id.* at 314-15.

closed by statistical studies.[214]

McCleskey produced three dissenting opinions: Brennan, joined by Marshall, Blackmun, and Stevens; Blackmun, joined by Brennan, Marshall, and Stevens; and Stevens, joined by Blackmun. Brennan addressed the evidentiary issue, and Blackmun went on to propose another approach to equality issues. Brennan's dissent argued that McCleskey was a member of a group about whom the statistical evidence "relentlessly documents the risk that [his] sentence was influenced by racial considerations."[215] Also, he stressed that the state prosecuting McCleskey, Georgia, had a long history of race-conscious criminal justice. These factors, Brennan judged, raised a reasonable concern that discriminatory racial bias affected the sentence.[216] He then criticized the majority opinion for relying on statutory safeguards that might be biased and for raising unfounded fears about the ramifications for future cases of a decision favoring McCleskey.[217] Blackmun continued the attack on the majority by suggesting that McCleskey had established a prime facie case of discrimination. According to Blackmun, McCleskey had shown that he was a member of a disadvantaged group, had suffered a substantial degree of different treatment as evidenced by statistical data and Georgia procedures, and had suffered the different treatment because of a racially discriminatory procedure.[218] By using this test he also suggested that, despite the fears of the majority, it would benefit society to have a closer examination of racial considerations throughout the criminal justice process.

Building on themes identified in *Paradise* and *McCleskey*, the majority justices in *City of Richmond v. J.A. Croson Co.*[219] zeroed in on both the standard of review and the evidence of discrimination issues. For the Court, O'Connor focused her evaluation of a Richmond ordinance requiring the city's prime contractors to adhere to a 30 percent minority "set aside" for subcontractors on whether the program satisfied a compelling interest and was narrowly tailored to accomplish a remedial purpose.

O'Connor began her opinion by contending that Justice Marshall had tried to relax strict scrutiny in instances of racial discrimination to further allegedly remedial policy goals. She thought such

214. *Id.* at 319.
215. *Id.* at 328 (Brennan, J., dissenting).
216. *Id.* at 328-35 (Brennan, J., dissenting).
217. *Id.* at 335-42 (Brennan, J., dissenting).
218. *Id.* at 345 (Blackmun, J., dissenting).
219. 488 U.S. 469 (1989).

an approach let the level of scrutiny vary "according to the ability of different groups to defend their interests."[220] She thus found the Marshall approach to be unsound because it was race-conscious and did not universally apply to all categories of racial groups. Instead, O'Connor defined a compelling interest in remedying past discrimination as existing only when there was an individualized application of remedies by government to specific harmful acts of discrimination as confirmed by specific evidence on the record.[221] She found no such evidence on the record in this case.

O'Connor's review of the evidence of discrimination offered to justify the plan concluded that the lack of detailed connections between discrimination in the community and contract award practices resulted in a failure to establish a prima facie case of a specific constitutional or a statutory violation. She refused to accept the idea that a history of general patterns of societal discrimination directly disadvantaged minority contractors.[222] Although she could have ended her discussion at this point, she went on to cite the city for a failure to design narrowly tailored remedies. She contended that the city had not considered race-neutral alternatives to the plan and had used a quota rather than narrower, case-by-case review of discrimination claims.[223] Thus, the Richmond set-aside plan was race-conscious and contrary to her understanding of the individualized remedy required for an affirmative action plan to meet the strict scrutiny standard.

Kennedy largely supported O'Connor's position in a concurring opinion, but he stressed that he would only support remedial legislative action if there was a finding of "intentional discrimination."[224] Scalia also concurred in a unique and disjointed opinion arguing that the fourteenth amendment and the federal structure of constitutional government authorized only the federal government to use racial classifications to remedy discrimination.[225] To prevent oppressive acts by one racial group against another, states had only the power to eliminate their own systems of unlawful racial classification and to devise remedial programs that were not race-specific. Hence, states and their subdivisions could not adopt any race-conscious remedial

220. *Id.* at 495.
221. *Id.* at 496-98.
222. *Id.* at 498-506.
223. *Id.* at 507-08.
224. *Id.* at 519 (Kennedy, J., concurring in part).
225. Scalia did not focus on standards of review, but did indicate his general agreement with the proposition that strict scrutiny should be applied to all racial classifications by government. *Id.* at 520 (Scalia, J., concurring in judgment).

programs. Scalia then returned to the compelling interest issue to aver support for the individualized evidence criteria for the use of race-conscious remedies advanced by O'Connor for the Court.[226] Stevens concurred because the remedy was too sweeping given the harm that he was able to identify.[227]

Marshall was left to defend the proposition that race-conscious classifications designed to further remedial goals did not have to satisfy the highest level of scrutiny. Using a test of intensified but not strict scrutiny first appearing in the joint Brennan, Marshall, White, and Blackmun opinion in the *Bakke* case,[228] Marshall indicted that remedial programs had only "to serve important governmental objectives" and "be substantially related to the achievement of those objectives."[229] For Marshall the important governmental objectives justifying the program were the necessity of eliminating the harm generated by discrimination in the construction industry and the need to prevent the harm of perpetuating the effects of such discrimination.[230] Marshall then documented the continuing harms of past discrimination and took the majority to task for dismissing the value of various statements and other evidence offered by the city.[231] Having established discriminatory intent, he showed how the racially-conscious set-aside remedy devised by the city, including the 30 percent "quota," was substantially related to the interest in remedying past discrimination. He found that the program provided a workable remedy that was not "sweeping" and that did almost no harm to white-owned firms.[232]

Marshall concluded his *Croson* dissent by indicating that he was troubled by the majority's inability to distinguish between racist actions and actions designed to prevent the perpetuation of racism. In large measure he sought to justify the use of an intermediate standard of scrutiny in race conscious remedy cases where government sought to alleviate or prevent the perpetuation of racism, and a strict standard only when governmental actions themselves sponsored racism. The aim of his discussion was to avoid a "conventional" application of strict scrutiny that was "fatal" to efforts to eliminate the

226. *Id.* at 526-28 (Scalia, J., concurring in judgment).

227. *Id.* at 511-18 (Stevens, J., concurring in part).

228. Univ. of Calif. Regents v. Bakke, 438 U.S. 265, 359 (1978) (Opinion of Brennan, White, Marshall & Blackmun, JJ.).

229. *Croson*, 488 U.S. at 535 (Marshall, J., dissenting).

230. *Id.* at 536-37 (Marshall, J., dissenting).

231. *Id.* at 539-46 (Marshall, J., dissenting).

232. *Id.* at 548-49 (Marshall, J., dissenting).

ongoing effects of discrimination.[233] Additionally, he excoriated Scalia for the failure to recognize a distinction between the two sets of cases and for his "artful" effort to cordon off federal and state remedial efforts through a mistaken interpretation of the aims of school desegregation case doctrine and the Fourteenth Amendment.[234] Blackmun appended three paragraphs of pithy dissent that lamented the Court's regression from a role as a "bastion of equality."[235]

In *Metro Broadcasting v. FCC*,[236] Brennan offered his final Supreme Court opinion. At issue was a Federal Communications Commission order establishing preferences for minorities in the awarding of new broadcast licenses and a plan allowing transfer of existing licenses to a minority enterprise without a hearing before the FCC. Brennan used "intermediate tier" scrutiny in his analysis. He held that this measure mandated by Congress had only to "serve important governmental objectives within the power of Congress" that were "substantially related to achievement of those objectives."[237] He justified his use of intermediate scrutiny on the basis of *Fullilove v. Klutznick*,[238] in which the Court upheld a federal statute mandating a 10 percent minority set-aside in a federal construction grant program. Neither the plurality opinion by Burger, nor Marshall's concurring opinion in that case had utilized strict scrutiny to evaluate an affirmative action program mandated by Congress.

In applying the intermediate test, Brennan found that the FCC rule did serve an important governmental objective, specifically the creation of diversity of expression in a situation where circumstances restricted the opportunities for the exchange of opinion.[239] He also concluded that the FCC policy was based on substantial evidence which indicated a connection between minority ownership and diversity. Further, the judgment of the linkage did not rest on impermissible racial stereotyping. Congress and the FCC, he judged, had simply tried to enhance the chances of broadcast diversity in the aggregate.[240] The FCC had considered other alternatives, and the

233. *Id.* at 551-53 (Marshall, J., dissenting).
234. *Id.* at 558-59 (Marshall, J., dissenting).
235. *Id.* at 561 (Blackmun, J., dissenting).
236. 497 U.S. 547 (1990).
237. *Id.* at 3009.
238. 448 U.S. 448 (1980).
239. *Metro Broadcasting*, 110 S. Ct. at 3010-11.
240. *Id.* at 3016.

minority licensing rules it established were limited in extent, subject to flexible adjustment by Congress, and imposed no impermissible burdens on nonminorities since at issue was a very small percentage of all broadcast licenses.[241] Stevens concurred in a brief note that endorsed Brennan's opinion because the FCC program, unlike the set-aside plan struck down in *Croson*, offered future benefits rather than a remedy for past discrimination.[242]

O'Connor dissented, joined by Rehnquist, Scalia, and Kennedy. Her opinion began with the argument that *Croson* mandated strict scrutiny of a racial classification such as the FCC policy. She rejected the analysis based on *Fullilove*, contending that congressional remedies for discrimination should not be reviewed under an intermediate level of scrutiny.[243] Strangely for a conservative, this put her in the position of arguing against judicial restraint in reviewing acts of Congress. She felt that all racial classifications, including those that were purportedly "benign," had to be subjected to the same level of scrutiny, thereby rejecting the implications of Brennan's opinion and the Marshall dissent in *Croson*. She found that she simply could not distinguish benevolent from unconstitutional race-conscious acts and apply differing levels of scrutiny to different kinds of governmental action, for, "[a] lower standard signals that the Government may resort to racial distinctions more readily."[244]

O'Connor then criticized Brennan's analysis of the tailoring of the FCC policy. Again her argument contended that the policy was too amorphous and unspecific to alleviate past discrimination in a verifiable manner. The policy employed the "vague" association of societal discrimination with specific harms that had been rejected in *Croson* and other cases. Also, the policy presumed values were associated with race and used race as a matter of administrative convenience. Furthermore, the policy was adopted without assessment of more racially neutral methods for creating program diversity, was not clearly endorsed by Congress, and was unduly burdensome to individuals who were not members of the favored minority by creating a quota scheme in license transfers.[245]

Kennedy, joined by Scalia, also wrote a dissenting opinion. Kennedy's opinion criticized the abandonment of strict scrutiny by Brennan for what he considered to be the "trivial" reason of broad-

241. *Id.* at 3022-27.
242. *Id.* at 3028 (Stevens, J., concurring).
243. *Id.* at 3030 (O'Connor, J., dissenting).
244. *Id.* at 3033 (O'Connor, J., dissenting).
245. *Id.* at 3033-44 (O'Connor, J., dissenting).

cast diversity.[246] He felt that strict scrutiny had to be applied in all cases where racial classifications were at issue. Also, he contended that any treatment of groups and disadvantaged classes, as the subject of remedies, was unsatisfactory because "our Constitution protects each citizen as an individual, not as a member of a group."[247] Interestingly, *Metro Broadcasting* marked the unannounced return of White to the intermediate level of analysis he had accepted in *Bakke* but had rejected in *Croson*.

Although voting and opinion coalitions on equal protection issues shifted from case to case in the Rehnquist Court, clearly Brennan, Marshall, and Blackmun stood on the side of intermediate scrutiny, except in *Paradise*, and of using indirect evidence when remedies for past and potential racial discrimination were at issue. They saw a danger that a "neutral" strict scrutiny standard in most of these cases would actually abet the continuation of discrimination.[248] On the contrary, Rehnquist, O'Connor, Scalia, and Kennedy saw the virtue of neutral law and limited relief for discrimination. Underlying their insistence on application of strict scrutiny in all affirmative action cases is a view that all racial discrimination is of one kind.

Although the use of strict scrutiny in equal protection issues has undergone modification, the preponderance of equality issues before the Rehnquist Court have been resolved through statutory interpretation. Particularly the justices have addressed the definition of equality advanced by Title VII of the Civil Rights Act of 1964 and federal statutes adopted to enforce the equal protection clause. Overall, the action of the majority of the justices on this issue has reinforced the trend of equal protection clause interpretations that have made it more difficult for minority claimants to introduce evidence to substantiate discrimination against them.[249]

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246. *Id.* at 3045 (Kennedy, J., dissenting).

247. *Id.* at 3046 (Kennedy, J., dissenting).

248. *See* BAER, *supra* note 2, at 117.

249. Among the many cases that illustrate the parallels between the treatment of evidentiary issues by the Rehnquist Court in statutory cases and similar issues in constitutional cases are Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989) and Patterson v. McLean Credit Union, 491 U.S. 164 (1989).

In *Wards Cove*, a 5-4 decision with a majority opinion by White, the Court demanded that the alleged victims of racial discrimination in employment produce more than statistical proof to justify their claim and demands for race-conscious remedies. The burden was placed on the alleged victims to show that each challenged practice had a disparate impact on their employment opportunities. Only after the establishment of a prima facie case in this fashion would the burden of proof shift to the employer. 490 U.S. at 658; *see also* Watson v. Fort Worth Bank and Trust, 487 U.S. 977 (1988).

Thus, in both the constitutional and statutory racial equality cases the Rehnquist Court was closely divided and often so split that only plurality opinions emerged. However, the only consistent de-

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In a Title VII gender discrimination case, a divided Court offered four opinions on the standard to be used to evaluate evidence of discrimination and on the assignment of the burden of proof. However, the outcome indicated that parties alleging any form of illegal discrimination have to prove their case only through the satisfaction of a preponderance of the evidence standard, an establishment of evidence that the employer would not have made the same decision except for the illegitimate discriminatory impulse. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

Besides making the burden of evidentiary proof more difficult for parties alleging discrimination, the Court read statutes in ways that affected participation and the ability to present evidence in discrimination cases. In a challenge to a seniority system, Scalia ruled that only evidence of discrimination at the time of adoption of a seniority system could be considered in a Title VII suit. Evidence of discriminatory effects of the seniority system more than 300 days after its initiation could not be considered to prevent disruption of a seniority scheme relied on by other employees. Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989). Rehnquist, in a 5-4 decision, used the Rules of Civil Procedure to permit white fire fighters to challenge a consent decree to settle a Title VII dispute between a city and black fire fighters. The decision raised the possibility of continuing challenges to voluntary or court-ordered affirmative action by third parties alleging harm from the efforts of minorities to win relief under civil rights laws. Martin v. Wilks, 490 U.S. 755 (1989). Finally, an opinion for the Court by Scalia made it difficult for unions and other interest group intervenors, supporting a claimant alleging discrimination under Title VII, to collect attorney fees. Independent Fed'n of Flight Attendants v. Zipes, 491 U.S. 754 (1989).

Only in Johnson v. Transp. Agency, 480 U.S. 616 (1987), did a 5-4 majority approve an affirmative action employment program under Title VII. O'Connor provided the deciding vote and concurring opinion. She found that the prima facie evidence of prior discrimination, because of the absence of women in a work force, afforded the governmental employer the opportunity to establish a voluntary affirmative action plan. The plan was legal under Title VII so long as the employer had a "firm need" that remedial action was necessary. This was a stricter standard than that employed by Brennan for the Court.

The justices' treatment of 42 U.S.C. § 1981 has made equality claims more difficult by restricting the situations about which a party claiming discrimination can present evidence. For a 5-4 majority Kennedy read § 1981 to preclude suits against alleged acts of sexual harassment committed after employment. Patterson v. McLean Credit Union, 491 U.S. 164 (1989). The Court also adopted a reading of § 1981 which made it more difficult to initiate challenges against allegedly discriminatory governmental conduct by making a respondeat superior argument unavailable. Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701 (1989).

Finally, the Court made it more difficult to remedy discriminatory acts after liability was established. Rehnquist relied on the Rules of Civil Procedure to forbid a District Court from sanctioning city council members in Yonkers, New York who failed to vote for an ordinance necessary to achieve the implementation of a public housing desegregation remedy under Title VII. For a 5-4 majority he wrote that the sanctions were a "perversion of the normal legislative process" and that less extreme measures should have been used. Spallone v. United States, 493 U.S. 265, 280 (1990); *but compare* Missouri v. Jenkins, 495 U.S. 33 (1990). The only bright spot for proponents of civil rights has been the justices' willingness to expand the definition of disadvantaged groups which can claim discrimination under 42 U.S.C. §§ 1981-1982, to include Arab and Jewish Americans. Saint Francis College v. Al-Khazraji, 481 U.S. 604 (1987); Shaare Tefila Congregation v. Cobb, 481 U.S. 615 (1987). However, this change also might mark a symbolic diminishment of the use of legal guarantees as an instrument for the achievement of equality by African Americans.

fense of disadvantaged groups came from Brennan, Marshall, and Blackmun. O'Connor and Stevens carved out their own unique approaches in these cases, but they often ended up in a voting coalition with Rehnquist, Scalia, and Kennedy that used the language of strict scrutiny to deny equality claims. This coalition shaped the concept of strict scrutiny and the compelling interest standard in such a fashion that governments could never have a compelling reason to assist a disadvantaged group. White enigmatically never wrote an opinion on equal protection and split his votes among the coalitions.

VI. Strict Scrutiny in Other Contexts

The underlying logic of strict scrutiny discourse in the Warren and Burger Courts did not limit the possible range of heightened scrutiny to cases involving First Amendment claims and racial classifications. By the time of *Shapiro v. Thompson*,[250] the justices generally recognized that strict scrutiny was appropriate if a discriminatory classification was based on inherently suspect criteria or interfered with the exercise of a fundamental right. While Burger Court majorities were more likely to deem nonracial classifications "semi-suspect" than "suspect,"[251] the fact remains that a form of heightened scrutiny was generally applied in equal protection cases involving classifications by sex or birth status (legitimacy or illegitimacy).[252] Outside the equal protection area, the Burger Court from time to time endorsed the use of heightened scrutiny in substantive due process cases involving a fundamental right.[253] Thus, Section VI of this article concludes the discussion of strict scrutiny in the first four terms of the Rehnquist Court with a brief overview of nonracial equal protection cases and substantive due process cases.

A. *Nonracial Equal Protection Cases*

Cases presenting equal protection challenges to nonracial classifications by federal and state governments were fairly rare during the first four years of the Rehnquist Court and were handled with relatively little coalitional conflict. A unanimous opinion by Justice

250. 394 U.S. 618 (1969) (applying strict scrutiny to strike down durational residence requirements for welfare benefits that burdened the right of interstate travel).

251. Galloway, *Basic Equal Protection*, *supra* note 19, at 142-47.

252. Craig v. Boren, 429 U.S. 190, 197 (1976) (applying intermediate scrutiny in sex discrimination case); Trimble v. Gordon, 430 U.S. 762, 767 (1977) (applying standard that is less stringent than strict scrutiny, but not "toothless" to classifications based on "illegitimacy").

253. Roe v. Wade, 410 U.S. 113, 155 (1973).

O'Connor in *Clark v. Jeter*[254] suggested a broad consensus on the propriety of the heightened scrutiny framework and on rules governing its application. The justices unanimously applied the intermediate standard requiring a substantial relationship to an important governmental objective to strike down a state law setting a six-year statute of limitations applicable to paternity suits. Moreover, all nine justices joined O'Connor's opinion, which included a paragraph spelling out the appropriate levels of scrutiny for different kinds of classifications.[255]

The justices also tended toward unanimity in applying the rational basis standard to reject equal protection claims involving economic issues.[256] In *City of Dallas v. Stanglin*[257] the Court, rejecting First Amendment claims, applied the rational basis test to uphold an ordinance imposing age restrictions in "teenage dance halls." Yet, not all equal protection claims of businesses were rejected. In *Allegheny Pittsburgh Coal Co. v. County Commissioners of Webster County*[258] the Court unanimously struck down, under a nondeferential rationality standard,[259] a property tax assessment scheme that resulted in gross disparities in taxation of comparable properties.[260] Also struck down without dissent was a land ownership requirement for appointment to a government board.[261] Finally, the Court was unanimous in ruling that underrepresentation of larger boroughs on New York City's Board of Estimate violated the equal protection clause.[262] Although Brennan, Stevens, and Blackmun filed brief con-

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254. 486 U.S. 456 (1988).

255. *Id.* at 1914.

256. Pennell v. City of San Jose, 485 U.S. 1 (1988); United States v. Sperry Corp., 493 U.S. 52 (1990).

257. 490 U.S. 19 (1989).

258. 488 U.S. 336 (1989).

259. Galloway, *Means-End Scrutiny*, *supra* note 19, at 452-53.

260. *Allegheny Pittsburgh*, 488 U.S. at 343-44. This case is of great interest to California taxpayers because it has provided the foundation for an equal protection challenge to the system of property taxation created by voter approval of Proposition 13 in 1978. R.H. Macy & Co. v. Contra Costa County, 226 Cal. App. 3d 352, 276 Cal. Rptr. 530 (1991) cert. granted 111 S. Ct. 2256 (1991), cert. dismissed, 111 S. Ct. 2923 (1991). The U.S. Supreme Court's decision to hear the Macy's case produced sufficient controversy and economic pressure to induce Macy's to withdraw its petition. Oswald Johnston & Kevin Roderick, *Macy's Abandons Plea to Overturn Prop. 13's Legality*, L.A. TIMES, June 8, 1991, at A1. However, the issue of the constitutionality of the California system of property taxation remains on the Court's docket in a case brought by a Los Angeles County homeowner who paid a property tax five times higher than neighbors with similar homes. In Nordlinger v. Hahn, 112 S. Ct. 2326 (1992), the Court distinguished *Allegheney Pittsburgh* and upheld Proposition 13 using a deferential rational basis standard.

261. Quinn v. Milsapp, 491 U.S. 95 (1989).

262. Board of Estimate v. Morris, 489 U.S. 688 (1989).

curring opinions, they raised no objections to Justice White's majority opinion applying established reapportionment doctrine in language suggesting a heightened scrutiny standard.

Coalitional conflict characterized only a handful of nonracial equal protection cases, most notably *Kadrmas v. Dickinson Public Schools*.[263] With Justice O'Connor writing for a majority comprised of the four Reagan appointees and Justice White, the Court upheld a North Dakota law allowing "nonreorganized" school districts to charge a fee for school bus service. O'Connor offered a basic review of the application of "strict" and "heightened" scrutiny standards in prior equal protection cases, concluding that the rational basis standard was the appropriate test in this case.[264] Of the four dissenters, two disagreed with O'Connor's determination of the proper standard and two with her application of the rationality standard. Joined by Justice Brennan, Justice Marshall reiterated his long-standing position that "proper analysis of equal protection claims depends less on choosing the 'formal label' under which the claim should be reviewed than upon identifying and carefully analyzing the real interests at stake." [265] Although he conceded that "[t]his Court has determined that classifications based on wealth are not automatically suspect,"[266] he relied primarily on late Warren Court opinions[267] and *Plyler v. Doe*[268] to justify the conclusion that "exacting scrutiny should be applied" when a state law "has the predictable tendency to entrap the poor and create a permanent underclass."[269] Just as the Texas law excluding children of illegal aliens from free public education burdened the "educational opportunities of a disadvantaged group of children"[270] and could not be justified, so the application of the bus transportation fee to indigent families in this case did not rest on a substantial state interest.[271] Justice Stevens, joined by Blackmun, concluded that the challenged law could not survive rational basis scrutiny.[272] In *Lyng v. International Union*[273] all of the justices

263. 487 U.S. 450 (1988).

264. *Id.* at 458-62.

265. *Id.* at 467 (Marshall, J., dissenting).

266. *Id.* at 468 (Marshall, J., dissenting).

267. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); McDonald v. Board of Election Comm'rs. of Chicago, 394 U.S. 802, 807 (1969).

268. 457 U.S. 202 (1982) (striking down Texas law allowing school districts to bar children of illegal aliens from public schools).

269. *Kadrmas*, 487 U.S. at 469 (Marshall, J., dissenting).

270. *Id.* at 470-71 (citing Plyler v. Doe, 457 U.S. 202 (1982)) (Marshall, J., dissenting).

271. *Id.* at 471 (Marshall, J., dissenting).

272. *Id.* at 472-73 (Stevens, J., dissenting).

agreed on application of the rational basis standard to judge the constitutionality of a federal law restricting strikers' eligibility for food stamps, but Marshall, Brennan, and Blackmun disputed the majority's conclusion that the law was rationally related to a legitimate purpose.[274]

Otherwise, coalitional conflict in nonrace equal protection cases was quite muted. In *Pennsylvania v. Finley*[275] Brennan and Marshall took issue with the majority's rejection of all constitutional claims by a convict whose appointed counsel withdrew from the case on the basis that there were no collateral claims worth pursuing. Justice Brennan declared in a dissenting opinion that "[e]qual protection demands that the State eliminate unfair disparities between classes of individuals."[276] In *Bankers Life & Casualty v. Crenshaw*[277] only Blackmun dissented from a section of Marshall's opinion rejecting, under rational basis standards, an insurance company's claim that a state law penalizing unsuccessful appeals in civil cases violated the equal protection clause. Although he accepted the majority's articulation of the proper standard, Blackmun concluded that the penalty statute was not rationally related to a legitimate state purpose.[278] In a 5-4 majority rejecting both statutory and equal protection claims in a welfare benefits case, Blackmun, Brennan, Marshall and Stevens dissented on statutory grounds without reaching the constitutional question.[279]

B. *Substantive Due Process Cases*

In contrast to the relatively high level of consensus in nonracial equal protection cases is a striking degree of coalitional conflict in the substantive due process cases of the Rehnquist Court. Yet, the internal debate in these cases seems to turn more on defining the substantive rights protected by the Fifth or Fourteenth Amendment than on the appropriate level of scrutiny when substantive due process rights are recognized. In general, Justices Brennan, Marshall, and Blackmun were in agreement that rights should be recognized and accorded judicial protection, while Rehnquist, Scalia, and Ken-

273. 485 U.S. 360 (1988).
274. *Id.* at 374 (Marshall, J., dissenting).
275. 481 U.S. 551 (1987).
276. *Id.* at 569 (Brennan, J., dissenting).
277. 486 U.S. 71 (1988).
278. *Id.* at 90-91 (Blackmun, J., concurring in part and dissenting in part).
279. Sullivan v. Stroop, 496 U.S. 478, 485-86 (1990) (Blackmun, J., dissenting); *Id.* at 496-97 (Stevens, J., dissenting).

nedy sought to narrow due process rights. Decisions turned on the ability of either group to attract the support of swing voters O'Connor, Stevens, Powell, and White. Because two or more of these justices tended to lean toward the position of the Chief Justice and his allies, the narrow view of substantive due process rights was normally the majority position. In a pair of early substantive due process cases, the conservative coalition prevailed in rejecting a constitutional claim of entitlement to pretrial release on bail,[280] while the liberals gained a majority for a ruling that an "expectancy of release on parole" could be a substantive liberty interest protected by the due process clause.[281] In later cases, the conservative coalition generally prevailed in debates over the scope of due process rights.[282] In *Michael H. v. Gerald D.*[283] the conservative majority and the dissenters debated the methodology of declaring substantive rights and the scope of those rights rather than levels of scrutiny. Similarly in *Cruzan v. Director of Missouri Department of Health*[284] the debate between Rehnquist and Scalia on one hand and Brennan on the other focused primarily on the nature of the right to make decisions about health care, though Brennan explicitly argued that the right to refuse unwanted treatment is a fundamental right demanding the protection of heightened scrutiny.[285]

Even in the abortion cases of the first four years of the Rehnquist Court, debate centered more on the scope or generality of the asserted privacy right and on the future of *Roe v. Wade*[286] than on standards of review. Chief Justice Rehnquist's plurality opinion in *Webster v. Reproductive Health Services*[287] alluded to the debate over standards of review at several points, most notably in arguing that a state interest in protecting fetal life was no less *compelling* before viability than after.[288] Ultimately the decision to uphold the viability testing provision of the Missouri statute turned on Rehn-

280. United States v. Salerno, 481 U.S. 739 (1987).

281. Board. of Pardons v. Allen, 482 U.S. 369 (1987).

282. *See* LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 73-80 (1991). A good example of a narrow reading of the scope of due process rights is DeShaney v. Winnebego County Dep't of Social Servs., 489 U.S. 189 (1989). In that case the majority ruled over the protest of Brennan, Marshall, and Blackmun that the due process clause creates no affirmative obligation to provide protection against private violence.

283. 491 U.S. 110 (1989) (rejecting substantive due process claim of "right" to establish paternity).

284. 497 U.S. 261 (1990).

285. *Id.* at 2865 (Brennan, J., dissenting).

286. 410 U.S. 113 (1973).

287. 492 U.S. 490 (1989).

288. *Id.* at 519.

quist's conclusion that the provision "is reasonably designed" to promote the state's "legitimate end" of assuring that "abortions are not performed when the fetus is viable."[289] Although the dissenters took issue with Rehnquist on the standard of review question,[290] the central theme of Justice Blackmun's dissent was the future threat to the right of privacy recognized and protected by the *Roe v. Wade* framework.[291]

The two 1990 abortion cases, both dealing with parental notification laws for minors, also featured a high level of coalitional conflict, with five justices writing opinions in *Hodgson v. Minnesota*.[292] The prevailing opinion by Stevens was joined by O'Connor and the liberal trio in striking down Minnesota's virtually absolute requirement of notice to both parents prior to a minor's abortion, while the four Reagan appointees plus White formed a majority to uphold an alternative statutory provision permitting a judicial bypass procedure as a means of avoiding notification of both parents. Stevens (joined only by Brennan on this point), maintained that the burden of establishing constitutionality rested with the state,[293] but applied rationality standards to reach the conclusion that a two-parent notification requirement "does not reasonably further any legitimate state interest."[294] Marshall, Brennan, and Blackmun agreed that the "two parent notification requirement is *not even* reasonably related to a legitimate state interest," but they explicitly reiterated the position that *Roe v. Wade* was still controlling and that laws limiting the fundamental right to choose abortion should be subjected to the "most exacting scrutiny" of the compelling interest standard.[295]

In an opinion joined by White, Rehnquist, and Scalia, Justice Kennedy explicitly invoked precedent and the principle of deference to the legislature, stressed the legitimacy of state interests in protecting minors and promoting the role of parents in the care of children, and ultimately seemed to rely on rationality standards in arguing that the two-parent notification provision should be upheld with or

289. *Id.* at 520.

290. According to Justice Blackmun, "the plurality's novel test appears to be nothing more than a dressed-up version of rational-basis review, this Court's most lenient level of scrutiny." Webster v. Reproductive Health Servs., 109 S. Ct. at 3076 (Blackmun, J., dissenting). In addition, Blackmun maintained that "the viability testing provision does not pass constitutional muster even under a rational basis standard . . . ." *Id.* at 543.

291. *Id.* at 538, 557-60 (Blackmun, J., dissenting).

292. 497 U.S. 417 (1990).

293. *Id.* at 2937.

294. *Id.* at 2945.

295. *Id.* at 2952 (Marshall, J., concurring in part and dissenting in part).

without a judicial bypass.[296] Justice O'Connor based her critical vote on her previously stated view that a law that does not impose an "undue burden" on a woman's right to choose should be reviewed under a rational basis standard.[297] Applying this rule, she concluded that the two-parent notice requirement without a judicial bypass procedure was "unreasonable," but found the alternative procedure constitutionally permissible.[298] In a companion case, six justices found that Ohio's requirement of one-parent notification with a judicial bypass option met constitutional standards, although only four justices endorsed the section of Justice Kennedy's prevailing opinion concluding that the state legislature had "acted in a rational manner" to assure that in most cases a young woman facing a decision on abortion "will receive guidance and understanding from a parent."[299]

Aside from the abortion cases, coalitional conflict only occasionally centered on the standard of review applicable in substantive due process cases. In *Bowen v. Gilliard*[300] Justice Stevens had the support of a six-member majority for reaffirming the Burger Court rule that only a rational basis was required to sustain welfare legislation.[301] Without endorsing any particular heightened scrutiny formula, Justice Brennan argued that welfare laws that imposed a substantial burden on the individual's "fundamental interest in family life"[302] "must be justified by more than a mere assertion that the provision is rational."[303] In *Washington v. Harper*[304] the conservative majority and three liberal dissenters agreed that a prisoner's substantive liberty interests included freedom from arbitrary administration of antipsychotic drugs and on use of a standard of review derived from earlier prisoner rights cases,[305] but not on application of that standard. In short, coalitional conflict on standards of review

296. *Id.* at 2961 (Kennedy, J., concurring in judgment in part and dissenting in part).

297. Akron v. Akron Ctr. for Reproductive Health, Inc., 462 U.S. 416, 453 (1990) (O'Connor, J., dissenting).

298. *Hodgson*, 110 S. Ct. at 2950-51 (O'Connor, J., concurring in part).

299. Ohio v. Akron Ctr. for Reproductive Health, 497 U.S. 502 (1990).

300. 483 U.S. 587 (1987).

301. Stevens correctly attributed the Burger Court's rule of applying the rational basis standard in welfare rights cases to Dandridge v. Williams, 397 U.S. 471, 487 (1970), but clearly erred in his assertion that Justice Stewart wrote for a unanimous court in that case. Bowen v. Gilliard, 483 U.S. at 609.

302. *Bowen*, 483 U.S. at 619 (Brennan, J., dissenting).

303. *Id.* at 628 (Brennan, J., dissenting).

304. 494 U.S. 210 (1990).

305. Turner v. Safley, 482 U.S. 78 (1987); O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987).

was a significant feature of the Rehnquist Court's substantive due process litigation, but the debate on standards was mixed with and often overshadowed by a more fundamental debate about the scope of the underlying rights.

VII. CONCLUSION

The consideration in this article of strict scrutiny in cases decided on First Amendment, equal protection, and substantive due process grounds reveals general acceptance of means-end scrutiny as a model for resolving conflicts between individual rights and governmental power during the first four years of the Rehnquist Court. More specifically, a surprisingly strong consensus emerged during this period that some form of heightened scrutiny was appropriate in a wide range of constitutional cases. All of the justices agreed in principle that the most stringent form of strict scrutiny was the proper standard for reviewing restrictions on core political speech, and the early Rehnquist Court was by no means hostile to protection of First Amendment rights. There were, however, debates about the appropriate standard of review in many freedom of expression cases, and all of the justices except Brennan and Marshall supported a deferential approach in a significant number of such cases. Strict scrutiny was not applied in commercial speech cases, and Scalia's opinion in *Employment Division v. Smith*[306] indicates an effort to roll back the application of strict scrutiny in cases raising free exercise claims. Agreement that some form of heightened scrutiny is appropriate in a wide range of equal protection cases, particularly those involving racial classifications, cannot overshadow sharp disagreement within the Court about the standard to be applied in affirmative action cases or even more frequent disputes about criteria for the assessment of evidence relevant to constitutional issues.

In short, debates about standards of review reveal a limited consensus on basic principles, accompanied by sharp conflict over the application of these principles. These conflicts were reflected in a fluid pattern of coalitions that shifted from issue to issue and from case to case within a single issue area.[307] The Rehnquist Court's use of many variations of means-end scrutiny and related debates about

306. 494 U.S. 872 (1990).

307. Among the causes of these shifting patterns are Scalia's support for the application of strict scrutiny in many political speech cases, O'Connor's commitment to the "endorsement" approach in establishment clause cases, White's sometimes unexplained and apparently inconsistent positions in establishment and racial equal protection cases, and the unique approach to rights issues voiced in many of Stevens' opinions.

evidentiary standards to be used in resolving conflicts about rights and equality issues indicates that this is a Court lacking a common or even bipolar pattern of constitutional discourse. Small coalitions of justices must often find common ground with other small coalitions to produce a decision. When a decision emerges, it often reflects only the views of a plurality of the justices and is hemmed in by the language of concurring opinions. No clear "Rehnquist Court" majority position emerged during Rehnquist's first four years as Chief Justice.[308] Perhaps the fracturing of the Court reflects both Justice Brennan's continuing influence on his colleagues and the fact that Rehnquist and his conservative allies could not always agree on why some constitutional claims should be rejected.

Moreover, it is important to note that acceptance of the analytical framework and language of heightened scrutiny by all members of the Court, including the Reagan appointees, does *not* mean that the Court will systematically use its power of judicial review to defend interests of disadvantaged groups in American society. Whatever the pattern of coalitional conflict in a particular issue area, it is striking that during the Rehnquist Court era the outcome of internal debates has generally made it difficult to assert successfully innovative claims of rights. As commentators such as Timothy O'Neill, Martha Minow, and Robin West have noted, much of the language of equality and rights standards functions to confine these concepts and exclude more radical definitions of rights.[309] The resulting outcomes stifle demands of the disadvantaged for protection under the Constitution. As a result of the rejection of the Brennan-Marshall approach in many cases, the Court has offered only truncated protection for the interests of disadvantaged groups.

More critical for the future of rights might be the language of Rehnquist Court coalitions that legitimizes "reasonable" restrictions on the rights of disadvantaged groups. The vision of the political order advanced by coalitions joined by Rehnquist, Scalia, and Kennedy is dominated by a reluctance to recognize the injury to the body politic engendered by an individualistic construction of rights and

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308. Thus, this article provides support for earlier findings that Rehnquist has not been particularly successful as a leader who shaped Court decisions that generally conformed with the Chief Justice's own policy goals. *See* Davis, *supra* note 3.

309. *See* Timothy J. O'Neill, *The Language of Equality in a Constitutional Order*, 75 AM. POL. SCI. REV. 626 (1981); MARTHA MINOW, MAKING ALL THE DIFFERENCE (1990); Robin West, *Toward a Modern Abolitionist Interpretation of the Fourteenth Amendment* (1991) (Presented as Edward G. Donley Memorial Lectures, West Virginia University College of Law).

equal protection. These justices are disinclined to accept evidence of social injury and afford constitutional protection to a person as a member of a group or faction as opposed to privatized individual injury. They attend to only part of the disadvantages confronted by some Americans, and, hence, they learn about only part of the social behavior that creates potential liability for harms to rights and equal protection of the laws. Consequently, this coalition can at best assign a restricted or partial blame when they find incidents of political and social disempowerment and inequality directed against disadvantaged political, religious, and racial groups. When these justices engage in rights discourse they also use legal language to associate their position with "neutrality" (as in *Croson*), the traditions of the public (as in the establishment clause cases), or the virtues of political order (as in free expression and free exercise cases). At the same time these coalitions use language that conceals behind the concept of legal neutrality the harm done to the interests of disadvantaged groups through the outcome of the decision. The concept of rights and equality advanced by these justices thus becomes a set of values that maintains the political power of the interests that they support. The opinion language thus helps to defend those interests against counterclaims by defenders of the disadvantaged.

Also, because these justices tend to prefer majority values and because they believe that a law constructed by a majority is neutral, they are not sensitive to the idea that a concept of equality can recognize differences in a search for rights and polity principles beneficial to the polity. Their idea of remedies, especially in equal protection cases, applies the majority's notion of the means of insuring equality without ever admitting its partiality. No effort is made to envision equality from the vantage point of the disadvantaged group. They remain reluctant to debate about the political choice of designing remedies for the unfair differences that mar the polity and of tolerating other differences. Rather, they would escape political conflict and reproduce the existing political order by assuming that racial differences can be dealt with by allegedly neutral standards. They ignore the differences exposed by other disadvantaged political and religious groups by reference to the values of law, order, and tradition supported by legislative majorities. Thus, the Court is to have no active role in engendering the protection of the disadvantaged proffered by the equal protection clause and other constitutional guarantees.

Finally, what of the future of rights claims before the Supreme Court now that Justice Brennan has retired after 34 years as champion of the claims of the disadvantaged? The coalitional patterns

identified in this article seem to suggest considerable potential for new departures. Many decisions upholding rights claims were decided by narrow 5-4 or 6-3 majorities during the first four years of the Rehnquist Court. When constitutional claims were rejected, the justices in the majority often have been unable to unite behind an Opinion of the Court.

Thus, the departure of Brennan and the appointment of David H. Souter probably marks as important a change in the U.S. Supreme Court as any event in the past half century. During his testimony before the Senate Judiciary Committee, Souter relied on levels of scrutiny language in addressing questions put to him by senators, but the sheer plentitude of definitions and applications of this language on the contemporary Court raises questions about future applications of this approach to resolving constitutional questions. Indeed, the replacement of Brennan by Souter suggests parallels to other situations when strong proponents of a particular mode of constitutional discourse either joined or left the Court. In 1938-41 the dual federalists were replaced by nationalists. In 1953 the appointment of Warren meant the Court acquired a strong leader with liberal sensitivities, and in 1962 the primary theoretician of judicial restraint left the Court, opening the way to the "heyday" of Warren Court activism. [310] The replacement of Brennan, the primary architect of contemporary standards of discourse about rights and equal protection, with a judge whose appointment hearings gave little evidence of commitment to the Brennan agenda could be extremely significant. Thus, there is reason to think that the Souter appointment will make more likely the solidification of Court coalitions dominated by the appointees of recent Republican presidents.[311]

For example, a stronger coalition supporting strict scrutiny in at least some equal protection cases seems likely. Yet, the use of the compelling interest standard in affirmative action cases like *Croson* has the potential to gut the Brennan legacy and threaten the intellectual basis for the special protection of disadvantaged groups that has guided the Court since *Carolene Products*. If the justices remaining on the Court are unable to formulate the kinds of arguments found in many of Brennan's opinions, strict scrutiny might be applied pri-

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310. Edward V. Heck, *Justice Brennan and the Heyday of Warren Court Liberalism*, 20 SANTA CLARA L. REV. 841 (1980).

311. A coalition of Souter and the four Reagan appointees made up the majority when the justices voted to uphold against a First Amendment challenge a ban on nude dancing under a public indecency law in Barnes v. Glen Theatre, 111 S. Ct. 2456 (1991). Souter did not join Chief Justice Rehnquist's plurality opinion, however, concurring on narrower grounds.

marily when litigants representing relatively advantaged interests challenge affirmative action plans or governmental restrictions on the use of money in political campaigns.[312]

Outside the areas such as racial equal protection and political speech, where the coalition supporting strict scrutiny is strongest, increased resort to deferential standards is a distinct possibility. Without Brennan to articulate reasoned justifications for using heightened scrutiny criteria to protect the interests of the disadvantaged, the rationality language so attractive to Rehnquist, White, Scalia, and Kennedy is likely to find its way into an increasing number of majority opinions. Scalia's idea of rolling back the categories of cases subject to strict scrutiny, which found majority support in *Employment Division v. Smith*, could well take hold and flourish. Souter's confirmation testimony gave no hint he supported this approach, but the votes might already exist to form a coalition to accomplish it in free exercise or other First Amendment arenas. It will be several terms before a detailed assessment of Souter's impact can be made, but the 5-4 decision in *Sullivan v. Rust*[313] may provide an early indication of the trend to avoid the use of strict scrutiny in reviewing First Amendment and substantive due process claims. Such an approach could well provide the foundation for direct challenges to *Roe v. Wade* and other landmark decisions of the Brennan years.

312. *See, e.g.* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990).

313. 111 S. Ct. 1759 (1991) (upholding regulations prohibiting the use of federal family planning funds for abortion referrals or counseling).